146 U.S. 620

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~1101~~. ~~846~~ ~~390~~ 63

C. G. MEANS, W. W. MEANS, AND C. H. MEANS, PARTNERS DOING BUSINESS AS C. G. MEANS & SONS, PLAINTIFFS IN ERROR,

vs.

THE BANK OF RANDALL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED AUGUST 9, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1191.

C. G. MEANS, W. W. MEANS, AND C. H. MEANS, PARTNERS DOING BUSINESS AS C. G. MEANS & SONS, PLAINTIFFS IN ERROR,

vs.

THE BANK OF RANDALL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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1 In the District Court within and for the County of Cloud and State of Kansas.

THE BANK OF RANDALL, Plaintiff,
against
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business as C. G. Means & Sons, Defendants.

Petition.

Plaintiff for cause of action states that it now is and was on the 14th day of September, 1887, a corporation created, organized, existing, and doing business under and by virtue of the laws of the State of Kansas; that on the day and year aforesaid defendants were and now are partners doing business under the firm name and style of C. G. Means & Sons; that on said 14th day of September, 1887, one Robert G. Patterson was the owner of one hundred head of fat steers, cattle, of the value of six thousand seven hundred dollars, which he then and there sold to one Charles S. Lyons; that said cattle were then and there delivered to said Charles S. Lyons by the said Patterson; that said Lyons did not possess the money in his own right to pay for said stock, and applied to Dan. D. Bramwell, cashier and agent of plaintiff, for a temporary loan of said sum of sixty-seven hundred dollars until he could ship said cattle to Kansas City, and sell the same to defendants or some other person; that it was then and there agreed by and between said Patterson, said Lyons, and plaintiff that if plaintiff would advance and pay to said Patterson said sum of six thousand seven hundred dollars, the purchase price of said steers, that plaintiff should have a lien thereon for said sum; that said stock should be shipped by said Lyons, as consignor, by way of the Missouri Pacific
2 railroad, and consigned to defendants at Kansas City, Missouri; that defendants were at said time engaged in the business of buying and selling live stock in said Kansas City, and had theretofore agreed with said Lyons to buy said stock from him; that pursuant to said agreement, so made as aforesaid, plaintiff then and there paid to said Patterson said sum of six thousand seven hundred dollars, the purchase price of said steers; said Lyons delivered said cattle on board the cars of the Missouri Pacific Railroad Company in the town of Randall, in the county of Jewell and State of Kansas, consigned to defendants at Kansas City, Missouri, and then and there took and received from said Missouri Pacific Railroad Company a bill of lading for the same, being six car-loads of said steers (a copy of said bill of lading with the indorsement hereinafter mentioned is hereto attached marked Exhibit A and made part of this petition); that thereupon said Lyons drew his sight draft or bill of exchange on said defendants, dated on said 14 day of Sept., 1887, whereby he directed defendants to pay to him or his order the said sum of six thousand seven hundred dollars on demand, and in consideration of said sum so advanced by plaintiff, said Lyons then and there as-

signed by endorsement in writing and delivered said draft and said bill of lading of said Mo. Pacific Railroad Company to plaintiff; that said steers were by said Missouri Pacific Railroad Company transported to said Kansas City, or to the Union Stock Yards, in said city, and were on the 15th day of September, 1887, delivered to defendants in accordance with the contract to so deliver the same, set out in said bill of lading; that said defendants then and there accepted and received the same and converted them to their use and benefit; that said steers were of the value of seven thousand dollars;

3 that by reason of the payment of said sum of six thousand seven hundred dollars by plaintiff to said Patterson for said fat steers, and the assignment and delivery of said draft and bill of lading to plaintiff, plaintiff became the owner of and was entitled to the proceeds of said steers; that said draft so assigned as aforesaid, with said bill of lading so assigned as aforesaid thereto attached, was, on the said 15th day of September, 1887, duly presented in due time to defendants for payment, and payment was by them then and there refused, and said draft then and there protested for non-payment; that defendants were advised when they received said cattle that plaintiff had paid for same; that defendants have not paid said sum of six thousand seven hundred dollars to plaintiff nor any part thereof, but the same is yet due plaintiff from defendants; that a copy of said draft with the indorsements thereon is hereto attached, marked B, and made a part of this petition; that the costs of protest paid out by plaintiff is four dollars; that said defendants are non-residents of this State, and said bill of exchange or draft was drawn on them payable within the jurisdiction of the United States and without the jurisdiction of the State of Kansas.

Wherefore plaintiff prays judgment for the sum of six thousand seven hundred dollars, the purchase price of said steers, the sum of four dollars protest fees paid out and expended, and the further sum of four hundred and two dollars, damages on account of said protest; that it have an attachment against the property of defendants, and for other proper relief.

CALDWELL, ELLIS & COOKE,
Att'y for Pl'ff.

Filed Sept. 17, 1887.

C. F. HOSTETLER,
Clerk Dist. Court.

4 Clerk dist. court Cloud county, Kans., will please issue summons in the above-entitled cause against def'ts for $7,102, returnable according to law.

CALDWELL, ELLIS & COOK,
Att'ys for Pl'ff.

Indorsed: Bank of Randall, pl'ff, *vs.* C. G. Means & Sons, def'ts. Petition. Filed Sep. 17, 1887. C. F. Hostetler, clerk district court.

And thereupon the following affidavits were filed in the office of the district clerk of Cloud county, Kansas:

Affidavit.

In the District Court within and for the County of Cloud and State of Kansas.

THE BANK OF RANDALL, Plaintiff,
against
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business as C. G. Means & Sons, Defendants.

Dan. D. Bramwell, being duly sworn, on his oath states that he is the agent of plaintiff in the above-entitled cause; that said plaintiff has commenced an action against the defendants, C. G. Means, W. W. Means, and C. H. Means, for the recovery of seven thousand one hundred dollars; that said defendants are indebted to plaintiff in said sum for and on account of the purchase price of one hundred head of fat steers sold them by one Chas. S. Lyons and delivered to defendants at Kansas City, Mo.; that said Lyons purchased said steers from one Robert G. Patterson, and plaintiff advanced and paid the purchase price of six thousand seven hundred dollars to said Patterson, and said Lyons then and there pledged said cattle to pay said sum to plaintiff, and then and there drew his draft for said sum of six thousand seven hundred dollars on said defendants and assigned and delivered the same to plaintiff, who then became the legal owner and holder thereof; that said Lyons also took and received from the Mo. Pacific Railroad Company two bills of lading, whereby said R. R. Co. agreed to carry and deliver said steers to defendants at Kansas City, Missouri, and then and there assigned and indorsed said bills of lading to plaintiff and attached the same to said draft, whereby plaintiff became the owner of the same, and said Lyons also pledged said cattle to pay for the said money advanced; that said steers were received by said defendants from said Mo. Pacific R. R. Co. at Kansas City, Mo., on the 15th of September, 1887, and converted to their own use; that said draft and bills of lading were duly presented to defendants for payment on said last-mentioned day, and payment refused and said draft protested; that said defendants owe this plaintiff said sum for and on account of the purchase of said cattle, and their refusal to pay said draft for the purchase price thereof and the sum of six per cent. damages on said sum of six thousand seven hundred dollars is four hundred and two dollars and seven thousand one hundred and two dollars in all; that said claim is just, is due, and is wholly unpaid.

That said affiant believes said plaintiff ought to recover of said defendants the said sum of seven thousand one hundred and two dollars, with interest and costs.

That said defendants are non-residents of this State.

That defendants fraudulently contracted the debt and incurred the liability and obligation for which the above-named suit has been brought, and has [have] failed to pay the price and value of

6 the said articles and things delivered, which, by said contract, they were bound to pay on delivery; that defendants so conceal themselves that a summons cannot be served upon them.

D. D. BRAMWELL.

Subscribed and sworn to before me, the clerk of the district court within and for Cloud county, Kas., this 17th day of Sept., 1887.

C. F. HOSTETLER,
Clerk Dist. Court.

Indorsed: Affidavit. Filed Sep. 17, 1887. C. F. Hostetler, clerk district court.

In the District Court within and for the County of Cloud and State of Kansas.

THE BANK OF RANDALL, Plaintiff,
against
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business as C. G. Means & Sons, Defendants.

Dan. D. Bramwell, of lawful age, being duly sworn, on his oath states that he is the cashier and agent of plaintiff; that the defendants are non-residents of the State of Kansas, and that service of summons cannot be had upon them in said action within the State of Kansas; that they are the owners of real and personal property situate in this State, to wit, in the county of Cloud; that defendants are indebted to plaintiff in the sum of seven thousand one hundred and seven dollars, on which plaintiff has commenced this suit by attachment, and has caused a writ of attachment to be levied on the real and personal property belonging to said defendants in said county; that said cause is one of those mentioned in section 3871 Compiled Laws of Kansas, being section 72, chapter 80, of said laws, page 614.

D. D. BRAMWELL.

7 Subscribed and sworn to by said D. D. Bramwell before me this 17th day of Sept., 1887.

[SEAL.] C. F. HOSTETLER,
Clerk of Dist. Court of Cloud County, Kas.

Indorsed: Affidavit. Filed Sep. 17, 1887. C. F. Hostetler, clerk district court.

Order of Attachment.

In the District Court for the County of Cloud, State of Kansas. October Term, 1887.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners as C. G. Means & Sons, Defendants.

STATE OF KANSAS, *Cloud County,* } *ss:*

The State of Kansas to Edward Marshall, sheriff of Cloud county, Greeting:

You are hereby commanded to attach the lands, tenements, goods, chattels, stocks, rights, credits, moneys, and effects of the above-named defendants in Cloud county not exempt by law from being applied to the payment of the above-named plaintiff's claim of seven thousand one hundred seven dollars, or so much thereof as will satisfy said plaintiff's claim, and two hundred dollars, the probable costs of the above-entitled action, and return this writ on the 27th day of Sept., 1887.

Witness my hand and the seal of said court, at my office, [SEAL.] in Concordia, in said county, this 17 day of Sept., 1887.

C. F. HOSTETLER, *Clerk.*

Endorsed: Order of attachment. District court. Bank of Randall *vs.* C. G. Means *et al.* Issued Sept. 17, 1887; returnable 11, 27, 1887.

8 CONCORDIA, KAS., *Sept.* 17, 1887—10 o'clock a. m.

Received this writ Sept. 17, 1887; executed the same by going to the place where the following property of the within-named defendants, C. G. Means, W. W. Means, and C. H. Means, was found, to wit, on section 22, in township five, of range 4, in Cloud county, Kansas, and levied said writ on said section 22, in t'p 5, of range 4, Cloud county aforesaid. I also at said time and place levied upon and actually seized and took into my possession the following-described personal property belonging to said C. G. Means, W. W. Means, and C. H. Means, situate on said land, to wit, ten thousand bushels of old corn, 400 acres of corn in field, being about 8,000 bushels; 500 hogs of various sizes and ages, ten mules, four horses, one cow, one steer, and one calf and two tons of hay, and declared that by virtue of said order I attached said property at the suit of the within-named plaintiff, The Bank of Randall, and with John A. Shelhamer, William M. McCall, two householders, who were first sworn by me to make a true inventory and appraisement of the same, did make a true inventory and appraisement of all the said property, which inven-

tory was signed by me and said householders and is returned with this order.

Sheriff's fees:

Serving order	$ 50
Taking inventory, 1 day	1 00
Appraisement of property:	
2 appraisers	3 50
Summoning appraisers	75
Mileage, 24 miles	2 40
Guard from day to day	

EDWARD MARSHALL,
Sheriff of Cloud County.

Filed this 20th day of Sept., 1887.

C. F. HOSTETLER,
County Clerk.

9 On Sept. 20, 1887, there was filed in the office of the clerk of said court the following paper, to wit:

In the District Court for the County of Cloud, State of Kansas.
—— Term, 187–.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners as C. H. Means & Sons, Defendants.

We, John A. Shelhamer and W. M. McCall, disinterested householders, residents of Cloud county, in the State of Kansas, being first duly sworn impartially to appraise the property hereinafter described, and situate in said county and State, upon actual view thereof do estimate the real value of said property as follows:

Description.	Estimate of value.
Old corn in crib, ten thousand bushels	$3,500
New corn in field, eight " "	2,800
About five hundred hogs & pigs	1,600
Ten head mules, four head horses	1,100
One cow, one steer, one calf	50
640 acres land in sec. 22, town. 5, range 4	12,800
Ten tons hay	30
Total appraisement	$21,880

JOHN A. SHELHAMER.
WILLIAM M. McCALL.

Attest: EDWARD MARSHALL,
Sheriff of Cloud County.

10 STATE OF KANSAS, *Cloud County,* } *ss:*

We, John A. Shelhamer, William McCall, disinterested householders, residents of Cloud county, do solemnly swear, impartially and upon actual view thereof, to appraise the property hereinafter described, levied upon by Edward Marshall, sheriff of said county, so help us God.

Dated Sept. 17th, 1887.

JOHN A. SHELHAMER, 1.75.
WILLIAM M. McCALL, 1.75.

[Endorsed:] No. —. Appraisement of lands levied on. Bank of Randall *vs.* C. G. Means *et al.* Filed this 20 day of Sept., 1887. C. F. Hostetler, clerk. I certify the within to be a true copy of the original appraisement returned to me by the within-named appraisers. —— ——, sheriff.

11 In the District Court within and for the County of Cloud and State of Kansas.

THE BANK OF RANDALL, Plaintiff,
against
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business as C. G. Means & Sons, Defendants.

Precipe.

The clerk of the district court within and for Cloud county, State of Kansas, will please issue summons in the above-entitled cause, directed to the sheriff of Wyandotte county, State of Kansas, commanding him to summon defendants, C. G. Means, W. W. Means, and C. H. Means, to answer plaintiff's petition, wherein it claims judgment against defendants for seven thousand one hundred and seven dollars and costs of suit, and make same returnable according to law.

CALDWELL, ELLIS & COOK,
Att'ys for Pl'ff.

STATE OF KANSAS, *Cloud County:*

In the District Court, 12 Judicial District of the State of Kansas, in and for Cloud County.

The State of Kansas to the sheriff of Wyandotte county, Greeting:

You are hereby commanded to notify C. G. Means, W. W. Means, and C. H. Means, partners doing business as C. G. Means and Sons, that they have been sued by the Bank of Randall, in the 12 judicial district court in and for said county of Cloud, and that unless they answer by the 31 day of October, 1887, the petition of the said Bank of Randall against them filed in the clerk's office of said court such petition will be taken as true and judgment rendered accordingly.

12 You will make return of this writ on or before the 11th day of Oct., 1887.

Witness my hand, with the seal of said court affixed, at my office, in Concordia, this 21 day of Sept., 1887.

C. F. HOSTETLER, *Clerk.*

Endorsement: Suit brought for the recovery of money. Amount claimed, $7,107.00.

Sheriff's Return.

Received the within writ September 22nd, 1887, at 1 p. m. Served the same on the within-named C. G. Means, W. W. Means, and C. H. Means by delivering to each of them, in my county, a true copy of said writ, with all endorsements thereon, this 23rd day of September, 1887.

Fees:

Served copies, 3; serving writ	$1 75
Mileage, 6 miles	60
Total	$2 35

JAMES FERGUSON, *Sheriff.*

[Endorsed:] 12 judicial district, Cloud county. Summons. Bank of Randall against C. G. Means *et al.* Issued Sept. 21, 1887. Returnable Oct. 11, 1887. Filed Sept. —, 1887. C. F. Hostetler, clerk district court.

In the District Court of the 12 Judicial District of the State of Kansas, Sitting in said County of Cloud.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business as C. G. Means & Sons, Defendants.

STATE OF KANSAS, *Cloud County,* } ss:

The undersigned, Hale H. Cook, being one of the firm of Caldwell, Ellis & Cook and one of the attorneys of the plaintiff in the above-entitled suit, being first duly sworn, does on oath de-
13 pose and say that he has good cause to believe and does believe that C. G. Means, W. W. Means, and C. H. Means, the judgment debtors in the above-entitled suit, have debts owing them, and that the Kansas City Stock Yards Bank are indebted to them, viz., the said C. G. Means, W. W. Means, and C. H. Means.

Subscribed in my presence and sworn to before me, the undersigned, the clerk of the above-named district court, at my office, in the city of Concordia, Cloud county, Kansas, this 21st day of Sept., A. D. 1887.

In witness whereof I have hereunto set my hand and affixed my

official seal as such district court clerk the day and year last above written.

[SEAL.] C. F. HOSTETLER.

Indorsed: Filed Sep. 21, 1887. C. F. Hostetler, clerk district court.

In the District Court for the County of Cloud, State of Kansas.
October Term, 1887.

BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business as C. G. Means & Sons, Defendants.

STATE OF KANSAS, *Cloud County,* } *ss:*

The State of Kansas to sheriff of Wyandotte county, Greeting:

You are commanded to attach the lands, tenements, goods, chattels, stocks, rights, credits, moneys, and effects of the above-named defendants in Wyandotte county not exempt by law from being applied to the payment of the above-named plaintiff's claim of seven thousand and one hundred seven dollars, or so much thereof as will satisfy said plaintiff's claim and two hundred dollars, the
14 probable costs of the above-entitled action, and return this writ on the 11 day of October, 1887.

Witness my hand and the seal of said court, at my office, in Concordia, in said county, this 21st day of Sept., 1887.

C. F. HOSTETLER, *Clerk.*

[Endorsed:] No. —. Order of attachment. District court. Bank of Randall *vs.* C. G. Means *et al.* Issued —— 21, 1887. Returnable Oct. 11, 1887. Filed this 26th day of Sept., 1887. C. F. Hostetler, county clerk.

Served the same, in — county, on C. G. Means, W. W. Means, & C. H. Means personally by delivering a true, certified copy of this order of attachment to each of them, with all the endorsements thereon, at 4 o'clock p. m. on the 23rd day of September, A. D. 1887; no goods and chattels, lands or tenements, ordered to be attached in this cause other than a garnishment on the Kansas City Stock Yards Bank, which was served as per return on order of garnishment.

—— ——.

Sheriff's fees:

Serving order attach. & copies, 3---------- $1 75

STATE OF KANSAS, } ss:
Cloud County, }

In the District Court of the 12th Judicial District of the State of Kansas, Sitting in the County of Cloud, in said State.

BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners as C. G. Means and Sons, Defendants.

The State of Kansas to the Kansas City Stock Yards Bank:

You and each of you are hereby commanded and required to appear in the above-named district court, in the county of
15 Cloud, on the 24th day of October, 1887, that being the first day of the next term thereof, each of you then and there to answer, as a garnishee in the above-entitled action, and to answer under oath, all questions and interrogatories put to you respecting the property of every description of the above-named defendants, C. G. Means, W. W. Means, and C. H. Means and C. G. Means & Sons, or either of them, in the possession or under the control of yourselves or of any of you, and to disclose truly the amount owing by you or any of you to the said defendants or either of them at or after the service of this notice on you, whether due or not.

And you and each of you are hereby further notified to do and perform all that a garnishee in the above-entitled action is by law required to do and perform.

Witness my hand and the seal of said court, affixed at my office, in Concordia, this the 21st day of Sept., A. D. 1887.

C. F. HOSTETLER, *Clerk.*

STATE OF KANSAS, *Wyandotte County:*

Received this notice of garnishment on the 22nd day of September, A. D. 1887, and served the same, in my county, on the Kansas City Stock Yards Bank by delivering a true certified copy of this garnishment and interrogatories and attachment to Peter Connelly, personally, cashier of the said Kansas City Stock Yards Bank, at 4 o'clock p. m. on the 23rd day of September, A. D. 1887.

Service of this writ ------	50
Copy of same----------	25
Attached & copy on bank-	75
	$1 50

JAMES FERGUSON,
Sheriff of Wyandotte County, Kansas.

[Endorsed:] Notice of garnishment. No. —. Bank of
16 Randall *vs.* C. G. Means *et al.* Filed Sep. 26th, 1887. C. F. Hostetler, clerk district court. Caldwell, Ellis & Cook and Crittenden, McDougal & Stiles, attorney for plaintiff.

In the District Court of Cloud County, State of Kansas. October Term, 1887.

THE BANK OF RANDALL, Plaintiff,
against
C. G. MEANS, C. H. MEANS, and W. W. MEANS, Partners Composing Firm under Name of C. G. Means and Sons, Defendants.

STATE OF MISSOURI, *County of Jackson:*

Edward H. Stiles, being duly sworn, on his oath states that he is one of the attorneys of the plaintiff herein, and that he has good reason to and does believe that the Kansas City Stock Yards Bank has property of said defendants, above named, in its possession or is indebted to them.

EDWARD H. STILES.

I, B. W. Lightburn, a notary public within and for said last-named county and State, do hereby certify that the foregoing affidavit was subscribed to in my presence and sworn to before me by the said Edward H. Stiles, at Kansas City, in the county and State aforesaid, this 23 day of September, 1887.

In witness whereof I have hereunto set my hand and notarial seal.

BEN. W. LIGHTBURN,
Notary Public.

[SEAL.] My commission expires July sixth, 1889.

In the District Court of Cloud County, State of Kansas. October Term, 1887.

17 THE BANK OF RANDALL, Plaintiff,
against
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Doing Business under the Firm Name of C. G. Means and Sons.

Interrogatories to be Propounded to the Kansas City Stock Yards Bank, Garnishee Herein.

1. Do the defendants, C. G. Means and Sons, do business and keep an account with your bank?

2. How long have they been doing so, and about what is the monthly average of their business at your bank?

3. What is the present condition of their account, and what amount have they now on deposit or to their credit in your bank? State also the condition of their account on the day you were served with these interrogatories and on each succeeding day from that time up the time of your answer hereto.

4. Have either of the members composing said firm of C. G. Means and Sons, viz., C. G. Means, W. W. Means, and C. H. Means, an account with said bank? And, if so, please state the present condition of the same as to each of said parties, respectively, and what amount

each had to his credit on the day on which you were served with these interrogatories and on each succeeding day to the time of your answer hereto.

5. Is your bank in any manner indebted to the defendants or either of them, or does it owe them money or property which is not yet due? If so, state the particulars.

6. Have you or has your bank in your possession or under your control any property, rights, or credits of said defendants or either of them; if so, what is the value of the same? And state all the particulars?

7. Do you know of any debts owing to said defendants or
18 either of them, whether due or not due, or any property, rights, or credits belonging to them or either of them and now in the possession or under the control of others? If so, state all the particulars.

8. Do the defendants do their entire banking business at your bank? And, if not, state at what other bank they do business.

9. Do they or either of them own any stock or have any interest whatever in your said bank? If so, state the nature and extent and give the particulars.

Indorsed.

STATE OF KANSAS, *Wyandotte County:*

Received this writ of interrogatories on the 23rd day of September, A. D. 1887, and served the same, in my county, on the Kansas City Stock Yards Bank by delivering a true certified copy of these interrogatories and attachment and garnishment to Peter Connelly, personally, cashier of the said Kansas City Stock Yards Bank, at 4 o'clock p. m. on the 23rd day of September, A. D. 1887.

Serving this writ ----------	50
Copy of this writ ----------	25
	75

JAMES FERGUSON,
Sheriff of Wyandotte County, Kansas.

[Endorsed:] Bank of Randall *vs.* C. G. Means, W. W. Means, and C. H. Means, doing business under firm name of C. G. Means & Sons. Affidavit and interrogatories to be propounded to the Kansas City Stock Yards Bank, garnishee. Filed Sep. 26, 1887. C. H. Hostetler, clerk district court.

In the District Court within and for the County of Cloud and State of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners
19 Doing Business as C. G. Means and Sons, Defendants.

Motion to Make More Definite and Certain.

And now come the said C. G. Means and Sons, defendants, and move the court to require the plaintiff to make its petition more definite and certain in the following respects, to wit:

1. That the plaintiff be required to set forth a copy of the bill of lading referred to in said petition, with any and all endorsements thereon.

2. That the plaintiff be required to set forth a copy of the draft referred to in said petition, together with any and all endorsements thereon.

3. That the plaintiff be required to set forth a copy of the instrument of protest referred to in said petition.

WAGGENER, MARTIN & ORR,
Attorneys for Defendants.

Indorsed: The Bank of Randall, pl'ff, *vs.* C. G. Means *et al.*, def'ts. In the district court for Cloud county, Kansas. Motion to make more definite and certain. Filed Oct. 7, 1887. C. F. Hostetler, clerk district court. Attorneys for def'ts, Waggener, Martin & Orr.

On the 7th day of Oct., 187–, there was filed in the office of the clerk of the dist. court of Cloud county, Kas., an amended petition as follows:

In the District Court within and for the County of Cloud and State of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business under the Firm Name and Style of C. G. Means & Sons, Defendants.

20 *Amended Petition.*

Plaintiff, for cause of action, states that it is and was on the 14th day of September, 1887, a corporation created, organized, and existing and doing business at the town of Randall under and by virtue of the laws of the State of Kansas; that on the day and year aforesaid defendants were and now are doing business under the firm name and style of C. G. Means & Sons; that on the said 14th day of September, 1887, one Robert G. Patterson was the owner of ninety-eight (98) fat steer cattle of the value of sixty-

seven hundred ($6,700) dollars, which he then and there bargained with and agreed to sell to one Charles S. Lyons; that said Lyons did not possess the money in his own right to pay for said steers, and then and there applied to Dan. D. Bramwell, cashier and agent of plaintiff, for a temporary loan of said sum of sixty-seven hundred ($6,700) dollars with which to pay for the same until he could ship said cattle to Kansas City and sell them to defendants or some other person; that it was then and there agreed by and between said Patterson, Lyons, and plaintiff that if plaintiff would advance and pay to said Patterson the sum of sixty-six hundred ($6,600) —, the purchase price of said ninety-eight fat steers, and the further sum of one hundred ($100) dollars for expenses, that plaintiff should have a lien thereon for said sum and should have and retain the title, right of, and possession thereof until the sum was paid to it; that said stock should be shipped by said Lyons as consignor by way of the Missouri Pacific railroad, consigned and to be delivered to defendants, C. G. Means & Sons, at Kansas City, Missouri, in the following manner: Four (4) car-loads of said steers were to be shipped in the name of C. S. Lyons as consignor, and two (2) car-loads thereof were to be shipped in the name of John Guthrie as consignor; that defendants were
21 at the said time engaged in the business of buying and selling live stock for themselves and for other persons on commission at said Kansas City, Missouri; that, pursuant to said agreement so made as aforesaid between plaintiff, said Patterson, and said Lyons, the said Patterson then and there sold and delivered to said Lyons said ninety-eight (98) head of fat steers, and plaintiff then and there paid to him, the said Patterson, the said sum of sixty-six hundred ($6,600) dollars, the purchase price of said steers, and one hundred ($100) dollars for expenses to be paid in transporting said steers to Kansas City, and said Lyons delivered the same on board the cars of the Missouri Pacific Railroad Company in the town of Randall and county of Jewell and State of Kansas, consigned to defendants at Kansas City, Missouri, and then and there received from said Missouri Pacific Railroad Company one bill of lading for cars # 325, # 6016, # 1214, # 8014, by which said company acknowledged receipt of said steers from him, the said Lyons, and agreed to transport and deliver the same to C. G. Means & Sons, at Kansas City, Missouri, which said bill of lading said Lyons then and there endorsed and delivered to plaintiff. A copy of said bill of lading, with the endorsement thereon, is hereto attached, marked Exhibit A, and made part of this petition; that no bill of lading was actually issued to the said John Guthrie, but, by agreement made between the agent of the said railroad company, said Lyons, and this plaintiff, two cars, # 5500 I. M. and # 5608 I. M., were loaded with sixteen (16) steers each and shipped to said C. G. Means & Sons, at Kansas City, Missouri, as consignees and said John Guthrie as consignor; that the four (4) cars for which the bills of lading issued in the name of said Lyons contained sixty-six steers in all; that it was then and there understood and agreed by and between said Missouri Pacific Railroad Company, said Lyons, and this plaintiff that

plaintiff waived no claim or title to said steers or the money
22 to be derived from the sale thereof by permitting them to be shipped in the name of said John Guthrie; but it was agreed between said parties that they should be delivered to said defendants along with the other steers, and that the proceeds thereof should be applied to the payment of the sum of sixty-six hundred ($6,600) dollars, the purchase price paid said Patterson for said steers, and the further sum of one hundred ($100) dollars advanced said Lyons; that thereupon said Lyons drew his sight draft or bill of exchange on said defendants, dated on said 14th day of September, 1887, whereby he directed defendants to pay to his order the said sum of sixty-seven hundred ($6,700) dollars at sight at Kansas City, Missouri; and in consideration of said sum of money so advanced and paid by plaintiff, and in compliance with said agreement, so made as aforesaid between him and plaintiff, and for the purpose of the pledge aforesaid, and to more fully transfer the title to said ninety-eight (98) head of steers and the money to be received therefor to this plaintiff, said Lyons then and there assigned by endorsement and delivered said draft and bill of lading of said Missouri Pacific Railroad Company to plaintiff; that said ninety-eight (98) head of steers were, by said Missouri Pacific Railroad Company, transported to Kansas City, Missouri, and to the stock yards in Kansas City, Kansas, and were, on the 15th day of September, 1887, at the hour of nine o'clock a. m., delivered to defendants in accordance with the contract to so deliver the same, set out in said bill of lading and made between plaintiff, said Lyons, and the agent of the said railroad company, at the town of Randall, above referred to; that defendants accepted and then and there received the same, sold same for account of said Lyons, and converted the proceeds thereof to their own use and benefit; that they have failed, neglected, and refused to pay plaintiff for said steers, or any part thereof, or
23 render it any account of sales or of the amount received for same or the name of the party or parties to whom said steers were sold, though often requested by plaintiff so to do.

Plaintiff further states that at the time said steers were delivered to the said defendants, to wit, on the 15th day of September, 1887, they were advised by the said C. S. Lyons that plaintiff had advanced the money to pay for the same, and that he, the said Lyons, had drawn his draft for the purchase price thereof on C. G. Means & Sons and assigned it to plaintiff; that by reason of the contract and agreement so made as aforesaid between plaintiff, said Lyons, and said Patterson, the payment of said sum of sixty-seven hundred ($6,700) dollars thereon by plaintiff to said Patterson and Lyons for said ninety-eight (98) head of steers, and the assignment and delivery of said draft and said bill of lading to plaintiff, plaintiff became the owner of said steers and entitled to the proceeds thereof; that said draft so assigned as aforesaid, together with said bill of lading so assigned as aforesaid, thereto attached, was on the 15th day of September, 1887, at the hour of eleven o'clock a. m. of said day, by Ed. Kingsbury and Wood Hickman, messengers of the National Bank of Commerce of Kansas City, Mo., presented to the

cashier of said C. G. Means & Sons, at their office in the Kansas City Stock Yards, for payment and payment demanded; that said cashier, after examining said draft, directed said messengers to leave the same at the Kansas City Stock Yards Bank, and then and there promised to pay the same if they would so deposit at said bank; that, pursuant to the directions so given and said agreement so made between said cashier and said messengers, said draft was by the latter immediately deposited with the Kansas City Stock Yards Bank, and was by the messengers of said bank, at 2.30 p. m. of said day, again presented at the office of defendants, C. G. Means & Sons, to them for payment, and payment was by them then and there refused and said draft then and there protested for non-pay-
24 ment; that at the time said draft and bill of lading were first presented to the defendants for payment as aforesaid said steers had not been by them disposed of, and were at the time being received by them from the cars of the Missouri Pacific Railway Company; that a copy of said draft, with the endorsements thereon, is hereto attached, marked Exhibit B, and made part of this petition.

$6,700.00. RANDALL, KANSAS, 9, 14, 1887.

At sight pay to the order of C. S. Lyons sixty-seven hundred and no 100 dollars, value received, and charge the same to the account of—

329. C. S. LYONS.

To C. G. Means & Sons, St. Yds., Kansas City, Mo.

[Endorsed:] Exhibit B. Protested for non-payment. Sept. 15, 1887. P. Connelly, N. P. C. S. Lyons. Pay C. J. White or order for account of Bank of Randall. D. D. Bramwell, cashier. For collection. C. J. White, cashier.

That for more than twelve (12) months previous to said 14th day of September, 1887, said Lyons had been engaged in shipping stock to defendants and accustomed to drawing drafts in favor of plaintiff and other persons against such shipments and transferring the bills of lading and stock so shipped to the parties holding such drafts and bills of lading on account of such shipments; that defendants, previous to said 15th day of September, 1887, were accustomed to and did pay all such drafts so drawn on them by said Lyons and in favor of plaintiff and other persons, and had never refused payment of any of the same.

Plaintiff further states that defendants have not paid and have refused to pay said sum of sixty-seven hundred ($6,700) dollars to plaintiff, or any part thereof, or to any one for its use, though requested so to do, and the same is yet due and unpaid; that the cost of protest paid out by plaintiff is four ($4) dollars; that defendants are non-residents of this State, and said bill of exchange or draft was drawn on them payable within the jurisdiction of the United States and without the jurisdiction of the State of Kansas. A copy of the notice and certificate of presentation, refusal of payment, and

protest of said draft served on plaintiff is hereto attached, marked Exhibit C, and made a part of this petition.

Wherefore plaintiff prays judgment for the sum of six thousand and seven hundred ($6,700) dollars, the purchase price of said steers; the sum of four ($4) dollars, protest fees paid out
25 and expended, and the further sum of four hundred and two ($402) dollars, damages on account of said protest, with interest thereon from September 15th, 1887, and that it may, on account of the matters and grounds set forth and contained in the affidavit of plaintiff's agent filed herein, have an attachment against the property of defendants, and for other proper relief.

CRITTENDEN, McDOUGAL & STILES AND
CALDWELL, ELLIS & COOK,
Attorneys for Plaintiff.

Indorsed: Bank of Randall *vs.* Means *et al.* Amended petition. Filed Oct. 7, 1887. C. F. Hostetler, clerk, by L. N. Houston, deputy clerk. District court.

26 EXHIBIT "A."

25, 26, 27.

Form 1132.

The Missouri Pacific Railway, C. B. Division of — Railway.

Rates guaranteed.

RANDALL, 9, 14, 1887.

To _____
Charges advanced _____ $—.
If 1st class__ — cts. per 100 lbs.
If 2d class__ — cts. per 100 lbs.
If 3d class__ — cts. per 100 lbs.
If 4th class__ — cts. per 100 lbs.
If 5th class__ — cts. per 100 lbs.
Cotton _____ — cts. per —.
_____ — cts. per 100 lbs.
_____ — cts. per 100 lbs.
Flour and meal_____ — per bbl.
Beef, pork, and fish_ — per bbl.
Special_____ — per —.

Received from C. S. Lyons the following packages, contents unknown, in apparent good order, marked and numbered as per margin, to be transported from Randall to Kansas City and delivered to the consignee or a connecting common carrier. The packages aforesaid may pass through the custody of several carriers before reaching their destination, and it is understood, as a part of the consideration for which the said packages are received, that the exceptions from liability made by such carriers, respectively, shall operate in the carriage by them, respectively, of said packages as though herein inserted at length, and especially that neither of said carriers or either or any of them or this company shall be liable for leakage of any kinds of liquids, nor for losses by bursting of casks or barrels of liquids arising from expansion or other unavoidable causes, breakage of any kind of glass, carboys of acid, or articles packed in glass, stoves and stove furniture, castings, machinery, carriages, furniture, musical instruments of any kind, packages of eggs, or for loss or damage of hay, hemp, cotton, or for rust of iron and iron articles, or for loss or damage of any kind on any article whose bulk requires it to be carried

on open cars, or for leakage of grain in bulk, or for damages to personal property of any kind occasioned from delays from any cause or change of weather, or for loss or damage by fire, or for loss or damage on seas, lakes, canals, or rivers; and it is further especially understood that for all loss or damage occurring in the transit of said packages the legal remedy shall be against the particular carrier only in whose custody the said packages may actually be at the time of the happening thereof, it being understood that the Missouri Pacific Railway Company, in receiving the said packages to be forwarded as aforesaid, assumes no other responsibility for their safety or safe carriage than may be incurred on its own road. All goods carried by this company are charged at actual gross weight, excepting such articles as are provided for in our general tariff.

All property will be subject to necessary cooperage, and freight is to be paid on the actual gross weight as ascertained by the company's scales. Carriers will not be accountable for loss in weight of flour, grain, seeds, feathers, or other goods arising from unavoidable causes. Cotton in bales is at the owner's risk of wet or dirt. Claims for damages must be reported by consignee, in writing, to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice is not there given, neither this company nor any of the connecting or intermediate carriers shall be liable. In the event of the loss of property under the provisions of this agreement the value or cost of the same at the point of shipment shall govern the settlement.

The carriers reserve the privilege of compressing all cotton signed for on this bill of lading.

☞No liability will be assumed for wrong carriage or wrong delivery of goods that are marked with initials, numbered, or imperfectly marked.

NOTICE.—This contract is accomplished and the liability of the companies as common carriers thereunder terminates on the arrival of the goods or property at the station or depot of delivery, and the companies will be liable as warehousemen only thereafter; and, unless removed by the consignee from the station or depot of delivery within twenty-four hours of their said arrival, they may be removed and stored by the companies at owner's expense and risk.

NOTICE.—In accepting this contract the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations and conditions.

Consigned to C. G. Means & Sons, at Kans. City, Mo.

☞Weight and classification subject to correction.

Marked.	List of articles.	Weight.
Car 325, Mo. P.	Cattle	20,000
" 6016, "	do.	20,000
" 1214, M., K. & T.	do.	20,000
" 8014, " "	do.	20,000

4 cars.

N. G. WERRILL, *Agent.*

Endorsements: C. S. Lyons. For collection. C. J. White, cashier.

27 28, 29, 30.

Protest. Copy of Bill or Note.

$6,700.00. RANDALL, Ks., 9, 14, 1887.

At sight pay to the order of C. S. Lyons sjxty-seven hundred & no 100 dollars, value received, and charge the same to the account of—

C. S. LYONS.

To C. G. Means & Sons, Kas. City, Mo., St. Yds.

Endorsements: C. S. Lyons pay C. J. White or order for account of Bank of Randall. D. D. Bramwell, cashier. For collection. C. J. White, cashier. No. 329. Due.

(EXHIBIT "B.")

$6,700.00. RANDALL, KANSAS, 9, 14, 1887.

At sight pay to the order of C. S. Lyons sixty-seven and no 100 dollars, value received, and charge to account of—

No. 329. C. S. LYONS.

To C. G. Means & Sons, St. Yds., Kansas City, Mo.

[On margin:] Protested for non-payment Sept. 15, 1887. P. Connelly, N. P.

[Endorsed:] C. S. Lyons. Pay C. J. White — order for account Bank of Randall. D. D. Bramwell, cashier. For collection. C. J. White, cashier.

UNITED STATES OF AMERICA, } ss:
State of Kansas, Wyandotte County, }

By this public instrument of protest be it known that on the 15 day of Sept., A. D. 1887, at the request of the holder, the Kansas City Stock Yards Bank, I, the undersigned, a notary public duly commissioned and sworn, did present the original draft, of which the above is a true and complete copy, to C. G. Means & Sons, at K. C. Stock Yards Exchange, and demanded payment thereon, which was refused.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer, maker, acceptor, and indorser of said draft as against all others whom it doth or may concern, for exchange, re-Exchange, and all costs, damages, and interest already incurred and to be hereafter incurred for want of payment of the *payment of the* same.

And on the same day I served due notice of the protest aforesaid upon the following-named persons by depositing such notice in the post office at Kansas City, Kansas, in a sealed envelope, postage

prepaid, and addressed to such persons at the places set opposite their names, to wit:

Notice addressed to C. S. Lyons, at Randall, Kansas;
" " D. D. Bramwell, cashier, at Randall, Kansas;
" " C. J. White, cashier, at K. C., Mo., *Kansas;*
" " C. G. Means & Sons, *at* in person;

each of said places being the reputed residence of the person to whom the notice was directed and the post office nearest thereto.

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year last above written.

Protest fees ----------
Notices---------- $1 00
Postage ----------

Total ----------

[L. S.] P. CONNELLY,
Notary Public.

Term expires July 2, 1891.

Registered, vol. 5, page 176.

Indorsed: No. —. Vol. —, page —. Protest.

28 [Endorsed.]

C. S. LYONS
vs.
MEANS & SONS.

STATE OF KANSAS, *Wyandotte County,* } *ss:*

I, the undersigned notary public, hereby certify that the within is a full, true, and complete copy of the original draft, with all indorsements thereon, and of the protest thereof, as the same appears in my official register, vol. 5, page 176.

In witness whereof I have hereunto set my hand and seal this 15 day of Sept., 1887.

P. CONNELLY,
Notary Public.

29 On the 7 day of Oct., '87, there was filed in the office of the clerk of the dist. court of Cloud county, Kansas, an affidavit as follows:

In the District Court within and for the County of Cloud and State of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business under the Firm Name and Style of C. G. Means & Sons, Defendants.

Dan. D. Bramwell, being duly sworn, on his oath states that he is the cashier & agent of the plaintiff in the above-entitled cause; that said plaintiff has commenced an action against defendants, C. G. Means, W. W. Means, and C. H. Means, for the recovery of seven thousand one hundred ($7,100) dollars; that said defendants are indebted to plaintiff in said sum for and on account of the purchase price of ninety-eight (98) head of fat steers sold by them for the account of one Charles S. Lyons and delivered to them at Kansas City Stock Yards, at Kansas City.

That on the said 14th day of September, 1887, one Robert G. Patterson was the owner of ninety-eight (98) fat steer cattle, of the value of sixty-six hundred ($6,600) dollars, which he then and there bargained with and agreed to sell to one Charles S. Lyons; that said Lyons did not possess the money in his own right to pay for said steers, and then and there applied to Dan. D. Bramwell, cashier and agent of plaintiff, for a temporary loan for said sum of sixty-seven hundred ($6,700) dollars with which to pay for the same until he could ship said cattle to Kansas City and sell them to defendants or some other person; that it was then and there agreed by and between Patterson, Lyons, and this affiant that if plaintiff would advance and pay to said Patterson the sum of sixty-six hundred ($6,600) dollars, the purchase price of said ninety-eight (98) fat steers, and the further sum of one hundred ($100) dollars for
30 expenses, that plaintiff should have a lien thereon for said sum, and should have and retain the title and possession thereto until the sum was paid to it; that said stock should be shipped by said Lyons as consignor by way of the Missouri Pacific railroad, consigned and to be delivered to defendants, C. G. Means & Sons, at Kansas City, Missouri, in the following manner: Four (4) car-loads of said steers were to be shipped in the name of C. S. Lyons as consignor and two (2) car-loads thereof were to be shipped in the name of John Guthrie as consignor; that defendants were at the said time engaged in the business of buying and selling live stock for themselves and for other persons on commission at said Kansas City; that, pursuant to said agreement so made as aforesaid between plaintiff, said Patterson, and said Lyons, the said Patterson then and there sold and delivered to said Lyons said ninety-eight (98) head of fat steers, and plaintiff then and there paid to him, the said Patterson, the said sum of sixty-six ($6,600) hundred dollars, the purchase price of said steers, and to C. S. Lyons the further sum of one hundred ($100) dollars expenses, and said Lyons delivered said steers on the cars of the Missouri Pacific Railroad Company, in

the town of Randall, in the county of Jewell and State of Kansas, consigned to defendants, at Kansas City, Missouri, and then and there received from said Missouri Pacific Railroad Company one bill of lading for cars # 325, # 6016, # 1214, and # 8014, by which said company acknowledged receipt of said steers from him, the said Lyons, and agreed to transport and deliver the same to C. G. Means & Sons, at Kansas City, Missouri, which said bill of lading said Lyons then and there indorsed and delivered to plaintiff; that no bill of lading was actually issued to the said John Guthrie, but by agreement made between the agent of said railroad company, said Lyons, and this plaintiff two (2) cars, # 500 I. W. and # 5608 I. W., were loaded with sixteen (16) steers each and shipped to said C.
31 G. Means & Sons, at Kansas City, Missouri, as consignees, and said John Guthrie as consignor; that the four (4) cars for which the bill of lading issued in the name of said Lyons contained sixty-six (66) steers in all; that it was then and there understood and agreed by and between said Missouri Pacific Railroad Company, said Lyons, and this affiant, as the agent of plaintiff, that plaintiff waived no claim or title to said steers or the money to be derived from the sale thereof by permitting them to be shipped in the name of said John Guthrie, but it was agreed between said parties that they should be delivered to said defendants along with the other steers, and that the proceeds thereof should be applied to the payment of said sum of sixty-six hundred ($6,600) dollars, the purchase price paid said Patterson for said steers, and the further sum of one hundred ($100) dollars advanced said Lyons; that thereupon said Lyons drew his sight draft or bill of exchange on said defendants, dated on said 14th day of September, 1887, whereby he directed defendants to pay to his order the said sum of sixty-seven hundred ($6,700) dollars, at sight, at Kansas City, Missouri; and in consideration of said sum of money so advanced and paid by plaintiff, and in compliance with the agreement so made as aforesaid between him and the plaintiff, and for the purpose of further evidence of the transfer and pledge and to more fully transfer the title to said ninety-eight (98) head of steers and the money to be receiver therefor to plaintiff, said Lyons then and there assigned, by indorsement thereon, and delivered said draft and said bill of lading of said Missouri Pacific Railroad Company to plaintiff; that said ninety-eight (98) head of steers were, by said Missouri Pacific Railroad Company, transported to Kansas City, Missouri, and to the stock yards in Kansas City, Kansas, and were, on the
32 15th day of September, 1887, at the hour of nine o'clock a. m., delivered to defendants, in accordance with the contract to so deliver the same, set out in said bill of lading, and made between plaintiff, said Lyons, and the agent of said railroad company, at the town of Randall above referred to; that defendants then and there accepted and received the same and converted them to their own use and benefit; that they have failed, neglected, and refused to pay plaintiff for said steers or any part thereof or render it any account of sales or of the amount received for same or the name of the party or parties to whom said steers were sold, though often requested by

plaintiff so to do. Plaintiff further states that at the time said steers were delivered to the said defendants, to wit, on the 15th day of September, 1887, they were advised by said C. S. Lyons that plantiff had advanced the money to pay for the same, and that he, the said Lyons, had drawn his draft for the purchase price therefor on C. G. Means & Sons, and assigned it to plaintiff; that, by reason of the contract and agreement so made as aforesaid between plaintiff, said Lyons, and said Patterson, the payment of said sum of sixty-seven hundred ($6,700) dollars thereon by plaintiff to said Patterson and Lyons for said ninety-eight head of steers, and the assignment and delivery of said draft and said bill of lading to plaintiff, plaintiff became the owner of said steers and entitled to the proceeds thereof; that said draft so assigned as aforesaid, together with said bill of lading so assigned as aforesaid, thereto attached, was, on the 15th day of September, 1887, at the hour of 11 a. m. of said day, by Ed. Kingsbury and Wood Hickman, messengers of the National Bank of Commerce of Kansas City, Missouri, presented to the cashier of said C. G. Means & Sons, at their office, in the Kansas City Stock Yards, for payment, and payment demanded; that said cashier,
33 after examining said draft, directed said messengers to leave the same at the Kansas City Stock Yards Bank, and then and there promised to pay the same if they would so deposit it at said bank; that, pursuant to said directions so given and to said agreement so made between said cashier and said messengers, said draft was by the latter immediately deposited with the Kansas City Stock Yards Bank, and was by the messengers of said bank, at 2.30 p. m. of said day, again presented at the office of defendants, C. G. Means & Sons, to them for payment, and payment was by them then and there refused, and said draft was then and there protested for non-payment; that defendants have not paid and refuse to pay said sum of sixty-seven hundred ($6,700) dollars to plaintiff or any part thereof or to any one for its use, although often requested so to do, but the same is yet due and unpaid; that the cost of protest paid out by the plaintiff is four ($4) dollars. The defendants are non-residents of this State, and said bill of exchange or draft was drawn on them, payable within the jurisdiction of the United States and without the jurisdiction of the State of Kansas, by reason of which plaintiff became entitled to damages at the rate of six (6) per cent. per annum on said draft.

That said claim is just, is due, and is wholly unpaid; that said affiant believes said plaintiff ought to recover of said defendants the said sum of seven thousand one hundred ($7,100) dollars, with interest and costs; that said defendants are non-residents of this State; that said defendants fraudulently contracted the debt and incurred the liability and obligation for which the above-named suit has been brought, and has [have] failed to pay the price and value of the said articles and things delivered, which by said contract they were bound to deliver.

DAN. D. BRAMWELL.

34 Subscribed and sworn to before me, a notary public in and for Jewell county, Kansas, this 30th day of September, 1887.

[SEAL.] J. W. HALL,
Notary Public.

My commission expires Feb. 1st, 1890.

Endorsed: Bank of Randall *v.* Means *et al.* Affidavit. Filed Oct. 7, 1889. C. F. Hostetler, clerk, by L. N. Houston, deputy clerk, district court.

35 *Petition.*

In the District Court of Cloud County, State of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business as C. G. Means & Sons, Defendants.

Petition for removal to the circuit court of the United States, district of Kansas.

To the honorable the district court of Cloud county, State of Kansas:

Your petitioners respectfully show to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the controversy in said suit is between citizens of different States, and that the petitioners were at the time of the commencement of this suit and still are citizens of the State of Missouri, and that the plaintiff, The Bank of Randall, a banking corporation, was then and still is a citizen of the State of Kansas.

That your petitioners are the defendants in the above-entitled action and are non-residents of the State of Kansas and residents of the State of Missouri, and the time that the defendants are required by the laws of the State of Kansas or by any rule of the State court in which the suit is brought and now pending to answer or plead to the declaration or complaint of the plaintiff has not yet arrived, and no answer nor plea thereto has been made or filed, and the circuit court of the United States for the proper district is given original cognizance and jurisdiction thereof by virtue of the first section of chapter 373 of the Acts of the Forty-ninth Congress, second
36 session, approved March 3, 1887.

And your petitioners offer herewith a good and sufficient surety for their entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto, special bail not being originally requisite in this action.

And they pray this honorable court to proceed no further herein

except to make the order of removal required by law and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States in and for the district of Kansas; and they will ever pray.

C. G. MEANS & SONS, *Defendants.*
WAGGENER, MARTIN & ORR,
Attorneys for Petitioners.

STATE OF KANSAS, }
County of Atchison, } ss:

I, B. P. Waggener, being duly sworn, do say that I am a member of the firm of Waggener, Martin & Orr, the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

B. P. WAGGENER.

Subscribed by the said B. P. Waggener in my presence *by* and by him sworn to before me this 6th day of October, A. D. 1887.

[SEAL.] J. D. SMITH,
Notary Public.

My commission expires Sept. 13, 1891.

The above petition was indorsed as follows: Petition to re-
37 move cause on ground of citizenship. In the district court of Cloud county, Kansas. October term, 1887. The Bank of Randall, plaintiff, against C. G. Means & Sons, defendants. Petition to remove said cause to the circuit court of the United States for the district of Kansas on the ground of citizenship. Filed the 7th day of Oct., 1887. C. F. Hostetler, clerk. Waggener, Martin & Orr, attorneys for petitioner.

Bond.

Know all men by these presents that C. G. Means, W. W. Means, and C. H. Means, partners doing business as C. C. Means & Sons, as principals, and Cliff. S. Hetherington, as surety, are held and firmly bound unto The Bank of Randall, plaintiff, in the penal sum of five hundred ($500) dollars for the payment whereof, well and truly to be made unto the said The Bank of Randall, its successors, representatives, and assigns, — jointly and severally, firmly by these presents, yet upon these conditions: The said C. G. Means, W. W. Means, and C. H. Means, partners doing business as C. G. Means & Sons, having petitioned the district court of Cloud county, State of Kansas, for the removal of a certain cause therein pending, wherein the said The Bank of Randall is plaintiff and the said C. G. Means, W. W. Means, and C. H. Means, partners doing business as C. G. Means & Sons, are defendants, to the circuit court of the United States in and for the district of Kansas:

Now, if the said C. G. Means, W. W. Means, and C. H. Means,
38 doing business as C. G. Means & Sons, your petitioners, shall enter in the said circuit court of the United States on the

first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 7th day of Oct., A. D. 1887.

C. G. MEANS & SONS. [L. S.]
C. G. MEANS. [L. S.]
C. S. HETHERINGTON. [L. S.]

STATE OF KANSAS, } ss:
County of Atchison, }

I, Cliff. S. Hetherington, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Kansas and a property holder therein; that I am worth the sum of one thousand dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Kansas liable to execution of the value of more than one thousand dollars.

C. S. HETHERINGTON.

Subscribed in my presence by C. S. Hetherington and [SEAL.] by him sworn to before me this 6th day of October, A. D. 1887.

J. D. SMITH,
Notary Public.

My commission expires Sept. 13, 1891.

Indorsed: Bond for removal of cause. In the district court of Cloud county, Kansas. October term, 1887. The Bank of Randall, plaintiff, against C. G. Means & Sons, defendants. Bond for the removal of said cause to the circuit court of the United States for the district of Kansas. Filed the 7th day of Oct., 1887. C. F. Hostetler, clerk. Waggener, Martin & Orr, attorneys for petitioner.

39 Know all men by these presents that C. G. Means, W. W. Means, and C. H. Means, partners doing business as C. G. Means & Sons, of Kansas City, Missouri, as principals, and S. H. Barons and J. K. McLean, as surety, do hereby acknowledge themselves to be held and firmly bound unto the Bank of Randall in the penal sum of fourteen thousand and five hundred dollars ($14,500.00); for the payment of which, well and truly to be made, we bind ourselves, our executors and administrators, firmly by these presents, yet upon the following condition, namely, that—

Whereas on the 21st day of September, A. D. 1887, in an action instituted in the district court of Cloud county, Kansas, wherein The Bank of Randall was plaintiff and said C. G. Means, W. W. Means, and C. H. Means, partners doing business as C. G. Means and Sons, were defendants, on affidavit duly filed, an order of attachment was issued by the clerk of said court and directed to the sheriff of Cloud county, Kansas, and Wyandotte county, Kansas, commanding him

to attach the goods, chattels, wares, merchandise, and real property of the said defendants in sufficient amount to satisfy said claim and demand of said Randall Bank, as stated in said affidavit; and

Whereas said writs and order of attachment so issued by the clerk of said court have been levied upon the goods, chattels, and real estate of the said defendants and said defendants are anxious and desirous of having said property so levied upon released and discharged from said attachment:

Now, therefore, if the said C. G. Means and Sons shall well and truly perform the judgment of the court in said action of The Bank of Randall against the said C. G. Means, W. W. Means, and C. H. Means, partners in business as C. G. Means & Sons, then and in that event this obligation shall be void; otherwise to remain in full force and effect.

40 Witness our hands this 15th day of Oct., A. D. 1887.

S. H. BARONS.
C. G. MEANS & SONS.
C. G. MEANS.
W. W. MEANS.
J. K. McLAIN.
CHAS. H. MEANS.

The foregoing bond and sureties approved by me this 15th day of October, 1887.

C. F. HOSTETLER,
Clerk Dist. Court.

Indorsed: The Bank of Randall *v.* C. G. Means & Sons. Undertaking for discharge of attachment. Filed Oct. 15, 1887. C. F. Hostetler, clerk district court.

In the District Court in and for the County of Cloud, State of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business as C. G. Means & Sons, Defendants.

On the pleadings and proceedings herein and on the petition and bond filed herein by the defendants in the above-entitled action under the provisions of an act of the Congress of the United States passed March 3rd, 1887, entitled "An act to amend the act of Congress approved March third, 1875, entitled An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes, and to further regulate the jurisdiction of circuit courts of the United

41 States, and for other purposes," and on a motion of Messrs. Waggener, Martin & Orr, counsel for defendants, it is ordered that the security offered by the said defendants, C. G. Means & Sons, C. G. Means and C. S. Hetherington, be approved, and that the State court proceed no further in the cause, and that this cause be removed into the circuit court of the United States for the eighth circuit, sitting in and for the district of Kansas.

STATE OF KANSAS, } ss:
Cloud County, }

I, C. F. Hostetler, clerk of the district court of Cloud county, Kansas, do hereby certify that the foregoing is a full, true, and complete transcript of all papers and records now on file in my office.

Given under my hand and official seal, at my office, in Concordia, this 7th day of November, 1887.

[SEAL.] C. F. HOSTETLER,
Clerk Dist. Court.

Fee Bill.

BANK OF RANDALL, Pl'ff,
vs.
C. G. MEANS *et al.*, Def'ts.

Costs as follows, to wit:

C. F. Hostetler, clerk	$21 45
Ed. Marshall, sheriff Cloud Co.	4 60
" Wyandotte Co.	6 35
J. A. Shelhamer, appr's.	1 50
W. M. McCall, "	1 50
For keeping property	56 00
Total	$91 40

I, C. F. Hostetler, clerk, do hereby certify that the foregoing statement of costs are [is] correct as the same appears from my record of fees in said cause.

Given under my hand and seal this 26th day of October, 1887.

[SEAL.] C. F. HOSTETLER, *Clerk D. C.*

Endorsed: No. 6078. The Bank of Randall *vs.* C. G. Means & Sons. Transcript. Filed Nov. 12, 1887. A. S. Thomas, clerk, by Frank H. Holt, deputy.

42 In the Circuit Court of the United States for the District of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business under the Firm Name and Style of C. G. Means & Sons, Defendants.

Dan. D. Bramwell, being duly sworn, on his oath states that he is the cashier & agent of the plaintiff in the above-entitled cause; that said plaintiff has commenced an action against defendants, C. G. Means, W. W. Means, and C. H. Means, for the recovery of seven thousand one hundred ($7,100) dollars; that said defendants are indebted to plaintiff in said sum for and on account of the purchase price of ninety-eight (98) head of fat steers sold by them for the ac-

count of one Charles S. Lyons, and delivered to them at Kansas City Stock Yards, at Kansas City; that on the said 14th day of September, 1887, one Robert G. Patterson was the owner of ninety-eight (98) fat steer cattle of the value of sixty-six hundred ($6,600) dollars, which he then and there bargained with and agreed to sell to one Charles S. Lyons; that said Lyons did not possess the money in his own right to pay for said steers, and then and there applied to Dan. D. Bramwell, cashier and agent of plaintiff, for a temporary loan for said sum of sixty-seven hundred ($6,700) dollars with which to pay for the same until he could ship said cattle to Kansas City and sell them to defendant or some other person; that it was then and there agreed by and between Patterson, Lyons, and this affiant that if plaintiff would advance and pay to said Patterson the sum of sixty-six hundred ($6,600) dollars, the purchase price of said ninety-eight (98) fat steers, and the further sum of one hundred ($100) dollars for expenses that plaintiff should have a lien thereon
43 for said sum, and should have and retain the title and possession thereto until the sum was paid to it; that said stock should be shipped by said Lyons, as consignor, by way of the Missouri Pacific railroad, consigned and to be delivered to defendants, C. G. Means & Sons, at Kansas City, Missouri, in the following manner: Four (4) car-loads of said steers were to be shipped in the name of C. S. Lyons as consignor, and two (2) car-loads thereof were to be shipped in the name of John Guthrie as consignor; that defendants were at the said time engaged in the business of buying and selling live stock for themselves and for other persons on commission at said Kansas City; that, pursuant to said agreement so made as aforesaid between plaintiff, said Patterson, and said Lyons, the said Patterson then and there sold and delivered to said Lyons said ninety-eight (98) head of fat steers, and plaintiff then and there paid to him, the said Patterson, the said sum of sixty-six ($6,600) hundred dollars, the purchase price of said steers, and to C. S. Lyons the further sum of one hundred ($100) dollars expenses, and said Lyons delivered said steers on the cars of the Missouri Pacific Railroad Company in the town of Randall, in the county of Jewell and State of Kansas, consigned to defendants at Kansas City, Missouri, and then and there received from said Missouri Pacific Railroad Company one bill of lading for cars #325, #6016, #1214, and #8014, by which said company acknowledged receipt of said steers from him, the said Lyons, and agreed to transport and deliver the same to C. G. Means & Sons, at Kansas City, Missouri, which said bill of lading said Lyons then and there indorsed and delivered to plaintiff; that no bill of lading was actually issued to the said John Guthrie, but by agreement made between the agent of said railroad company, said Lyons, and this plaintiff, two (2) cars, #500 I. W. and #5608 I. W., were loaded
44 with sixteen (16) steers each and shipped to said C. G. Means & Sons, at Kansas City, Missouri, as consignees and said John Guthrie as consignor; that the four (4) cars for which the bill of lading issued in the name of said Lyons contained sixty-six (66) steers in all; that it was then and there understood and agreed by and between said Missouri Pacific Railroad Company, said Lyons,

and this affiant, as the agent of plaintiff, that plaintiff waived no claim or title to said steers or the money to be derived from the sale thereof by permitting them to be shipped in the name of said John Guthrie; but it was agreed between said parties that they should be delivered to said defendants along with the other steers, and that the proceeds thereof should be applied to the payment of said sum of sixty-six hundred ($6,600) dollars, the purchase price paid said Patterson for said steers, and the further sum of one hundred ($100) dollars advanced said Lyons; that thereupon said Lyons drew his sight draft or bill of exchange on said defendants, dated on said 14th day of September, 1887, whereby he directed defendants to pay to his order the said sum of sixty-seven hundred ($6,700) dollars, at sight, at Kansas City, Missouri; and in consideration of said sum of money so advanced and paid by plaintiff, and in compliance with the agreement so made as aforesaid between him and the plaintiff, and for the purpose of further evidence of the transfer and pledge and to more fully transfer the title to said ninety-eight (98) head of steers and the money to be received therefor to plaintiff, said Lyons then and there assigned by indorsement thereon and delivered said draft and said bill of lading of said Missouri Pacific Railroad Company to plaintiff; that said ninety-eight (98) head of steers were by said Missouri Pacific Railroad Company transported to Kansas City, Missouri,
45 and to the stock yards in Kansas City, Kansas, and were on the 15th day of September, 1887, at the hour of nine o'clock a. m., delivered to defendants, in accordance with the contract to so deliver the same, set out in said bill of lading, and made between plaintiff, said Lyons, and the agent of said railroad company, at the town of Randall above referred to; that defendants then and there accepted and received the same and converted them to their own use and benefit; that they have failed, neglected, and refused to pay plaintiff for said steers or any part thereof, or render it any account of sales or of the amount received for same, or the name of the party or parties to whom said steers were sold, though often requested by plaintiff so to do. Plaintiff further states that at the time said steers were delivered to the said defendants, to wit, on the 15th day of September, 1887, they were advised by said C. S. Lyons that plaintiff had advanced the money to pay for the same, and that he, the said Lyons, had drawn his draft for the purchase price therefor on C. G. Means & Sons and assigned it to plaintiff; that, by reason of the contract and agreement so made as aforesaid between plaintiff, said Lyons, and said Patterson, the payment of said sum of sixty-seven hundred ($6,700) dollars thereon by plaintiff to said Patterson and Lyons for said ninety-eight head of steers, and the assignment and delivery of said draft and said bill of lading to plaintiff, plaintiff became the owner of said steers and entitled to the proceeds thereof; that said draft so assigned as aforesaid, together with said bill of lading so assigned as aforesaid, thereto attached, was, on the 15th day of September, 1887, at the hour of 11 a. m. of said day, by Ed. Kingsbury and Wood Hickman, messengers of the National Bank of Commerce of Kansas City, Missouri, presented to the cashier of said C. G. Means & Sons at their office, in the Kansas City Stock

Yards, for payment and payment demanded; that said cashier,
46 after examining said draft, directed said messengers to leave the same at the Kansas City Stock Yards Bank, and then and there promised to pay the same if they would so deposit it at said bank; that, pursuant to said directions so given and to said agreement so made between said cashier and said messengers, said draft was by the latter immediately deposited with the Kansas City Stock Yards Bank, and was by the messengers of said bank, at 2.30 p. m. of said day, again presented at the office of defendants, C. G. Means & Sons, to them for payment, and payment was by them then and there refused, and said draft was then and there protested for non-payment; that defendants have not paid and refuse to pay said sum of sixty-seven hundred ($6,700) dollars to plaintiff or any part thereof or to any one for its use, although often requested so to do, but the same is yet due and unpaid; that the cost of protest paid out by the plaintiff is four ($4) dollars. The defendants are non-residents of this State, and said bill of exchange or draft was drawn on them, payable within the jurisdiction of the United States and without the jurisdiction of the State of Kansas, by reason of which plaintiff became entitled to damages at the rate of six (6) per cent. per annum on said draft.

That said claim is just, is due, and is wholly unpaid; that said affiant believes said plaintiff ought to recover of said defendants the said sum of seven thousand one hundred ($7,100) dollars, with interest and costs; that said defendants are non-residents of this State; that said defendants fraudulently contracted the debt and incurred the liability and obligation for which the above-named suit has been brought, and has [have] failed to pay the price and value of the said articles and things delivered, which by said contract they were bound to deliver.

D. D. BRAMWELL, *Cashier.*

47 Subscribed and sworn to before me, a notary public in and for Jewell county, Kansas, this 25th day of Nov., 1887.

[SEAL.] J. W. HALL,
Notary Public.

My commission expires Feb. 1st, 1890.

Endorsed: No. 6078. Bank of Randall *v.* C. G. Means & Sons. Affidavit. Filed Dec. 1, 1887. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

48 THURSDAY, *Dec.* 1, 1887.

Journal N, 64.

THE BANK OF RANDALL
vs.
C. G. MEANS & SONS. } No. 6078.

Leave is hereby given plaintiff to file its amended petition and affidavit herein.

49 EXHIBIT "A."

Form 1132.

The Missouri Pacific Railway, C. B. Division of — Railway.

Rates guaranteed.

RANDALL, 9, 14, 1887.

To _____
Charges advanced _____ $—.
If 1st class__ — cts. per 100 lbs.
If 2d class__ — cts. per 100 lbs.
If 3d class__ — cts. per 100 lbs.
If 4th class__ — cts. per 100 lbs.
If 5th class__ — cts. per 100 lbs.
Cotton _____ — cts. per —.
_____ _____ — cts. per 100 lbs.
_____ _____ — cts. per 100 lbs.
Flour and meal_____ — per bbl.
Beef, pork, and fish_ — per bbl.
Special_____ — per —.

Received from C. S. Lyons the following packages, contents unknown, in apparent good order, marked and numbered as per margin, to be transported from Randall to Kansas City and delivered to the consignee or a connecting common carrier. The packages aforesaid may pass through the custody of several carriers before reaching their destination, and it is understood, as a part of the consideration for which the said packages are received, that the exceptions from liability made by such carriers, respectively, shall operate in the carriage by them, respectively, of said packages as though herein inserted at length, and especially that neither of said carriers or either or any of them or this company shall be liable for leakage of any kinds of liquids, nor for losses by bursting of casks or barrels of liquids arising from expansion or other unavoidable causes, breakage of any kind of glass, carboys of acid, or articles packed in glass, stoves and stove furniture, castings, machinery, carriages, furniture, musical instruments of any kind, packages of eggs, or for loss or damage of hay, hemp, cotton, or for rust of iron and iron articles, or for loss or damage of any kind on any article whose bulk requires it to be carried on open cars, or for leakage of grain in bulk, or for damages to personal property of any kind occasioned from delays from any cause or change of weather, or for loss or damage by fire, or for loss or damage on seas, lakes, canals, or rivers; and it is further especially understood that for all loss or damage occurring in the transit of said packages the legal remedy shall be against the particular carrier only in whose custody the said packages may actually be at the time of the happening thereof, it being understood that the Missouri Pacific Railway Company, in receiving the said packages to be forwarded as aforesaid, assumes no other responsibility for their safety or safe carriage than may be incurred on its own road. All goods carried by this company are charged at actual gross weight, excepting such articles as are provided for in our general tariff.

All property will be subject to necessary cooperage, and freight is to be paid on the actual gross weight as ascertained by the company's scales. Carriers will not be accountable for loss in weight of flour, grain, seeds, feathers, or other goods arising from unavoidable causes. Cotton in bales is at the owner's risk of wet or dirt. Claims for damages must be reported by consignee, in writing, to the deliver-

ing line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice is not there given, neither this company nor any of the connecting or intermediate carriers shall be liable. In the event of the loss of property under the provisions of this agreement the value or cost of the same at the point of shipment shall govern the settlement.

The carriers reserve the privilege of compressing all cotton signed for on this bill of lading.

☞No liability will be assumed for wrong carriage or wrong delivery of goods that are marked with initials, numbered, or imperfectly marked.

NOTICE.—This contract is accomplished and the liability of the companies as common carriers thereunder terminates on the arrival of the goods or property at the station or depot of delivery, and the companies will be liable as warehousemen only thereafter; and, unless removed by the consignee from the station or depot of delivery within twenty-four hours of their said arrival, they may be removed and stored by the companies at owner's expense and risk.

NOTICE.—In accepting this contract the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations and conditions.

Consigned to C. G. Means & Sons, at Kansas City, Mo.

☞Weight and classification subject to correction.

Marked.	List of articles.	Weight.
Car 325, Mo. P.	Cattle	20,000
" 6016, "	do.	20,000
" 1214, M., K. & T.	do.	20,000
" 8014, "	do.	20,000

4 cars.

N. G. MERRILL, *Agent.*

49½ EXHIBIT "B."

$6,700.00. RANDALL, KANSAS, 9, 14, 1887.

At sight pay to the order of C. S. Lyons sixty-seven hundred and no 100 dollars, value received, and charge the same to the account of—

C. S. LYONS.

To C. G. Means & Sons, St. Yds., Kansas City, Mo.

[On margin:] Protested for non-payment Sept. 15, 1887. P. Connelly, N. P.

[Endorsed:] C. S. Lyons. Pay C. J. White or order for account of Bank of Randall. D. D. Bramwell, cashier. For collection. C. J. White, cashier. Exhibit "B."

50 *Protest. Copy of Bill or Note.*

$6,700.00. RANDALL, Ks., 9, 14, 1887.

At sight pay to the order of C. S. Lyons sixty-seven hundred & no 100 dollars, value received, and charge to the account of—
C. S. LYONS.

To C. G. Means & Sons, Kansas City, Mo., St. Yds.

Endorsements thereon: C. S. Lyons pay C. J. White or order for account of Bank of Randall. D. D. Bramwell, cashier. For collection. C. J. White, cashier. # 329. Due.

UNITED STATES OF AMERICA, } ss:
State of Kansas, Wyandotte County, }

By this public instrument of protest be it known that on the 15 day of September, A. D. 1887, at the request of the holder, the Kansas City Stock Yards Bank, I, the undersigned, a notary public duly commissioned and sworn, did present the original draft, of which the above is a true and complete copy, to C. G. Means & Sons, at the Kansas City Live Stock Exchange, and demanded payment thereon, which was refused.

Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer, maker, acceptor, and indorser of said draft as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred for want of payment of the same.

And on the same day I served due notice of the protest aforesaid upon the following-named persons by depositing such notice in the post office at Kansas City, Kansas, in a sealed envelope, postage prepaid, and addressed to such persons at the places set opposite their names, to wit:

Notice addressed to C. S. Lyons, at Randall, Kans.;
Notice addressed to D. D. Bramwell, cashier, at Randall, Kans.;
Notice addressed to C. J. White, cashier, at Kansas City, Mo.;
Notice addressed to C. G. Means & Sons, in person;

each of said places being the reputed residence of the person to whom the notice was directed and the post office nearest thereto.

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year last above written.

Protest fees	100 00
Notices	
Postage	
Total	

[SEAL.]

P. CONNELLY,
Notary Public.

Term expires July 2, 1891.

Registered, vol. 5, page 176.

[Endorsed.]

51 No. —, vol. —, page —.

EXHIBIT "C."

Protest.

C. S. LYONS *on* MEANS & SONS.

STATE OF KANSAS, } ss:
Wyandotte County, }

I, the undersigned, notary public, hereby certify that the within is a full, true, and complete copy of the original draft and all indorsements thereon and of the protest thereof as the same appears in my notarial register, vol. 5, page 176.

In witness whereof I have hereunto set my hand and seal this 15th day of Sept., 1887.

[SEAL.] P. CONNELLY,
Notary Public.

52 In the Circuit Court of the United States for the District of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business under the Firm Name and Style of C. G. Means & Sons, Defendants.

Amended Petition.

Plaintiff, for cause of action, states that it is and was on the 14th day of September, 1887, a corporation created, organized, existing, and doing business at the town of Randall under and by virtue of the laws of the State of Kansas; that on the day and year aforesaid defendants were and now are doing business under the firm name and style of C. G. Means & Sons; that on the said 14th day of September, 1887, one Robert G. Patterson was the owner of ninety-eight (98) fat steer cattle, of the value of sixty-seven hundred ($6,700) dollars, which he then and there bargained with and agreed to sell to one Charles S. Lyons; that said Lyons did not possess the money in his own right to pay for said steers, and then and there applied to Dan. D. Bramwell, cashier and agent of plaintiff, for a temporary loan of said sum of sixty-seven hundred ($6,700) dollars with which to pay for the same until he could ship said cattle to Kansas City and sell them to defendants or some other person; that it was then and there agreed by and between said Patterson, Lyons, and plaintiff that if plaintiff would advance and pay to said Patterson the

sum of sixty-six hundred ($6,600) dollars, the purchase price of said ninety-eight (98) fat steers, and the further sum of one hun-
53 dred ($100) dollars for expenses, that plaintiff should have a lien thereon for said sum, and should have and retain the title, right of, and possession thereof until the sum was paid to it; that said stock should be shipped by said Lyons, as consignor, by way of the Missouri Pacific railroad, consigned and to be delivered to defendants, C. G. Means & Sons, at Kansas City, Missouri, in the following manner: Four (4) car-loads of said steers were to be shipped in the name of C. S. Lyons, as consignor, and two (2) car-loads thereof were to be shipped in the name of John Guthrie, as consignor; that defendants were at the said time engaged in the business of buying and selling live stock for themselves and for other persons on commission at said Kansas City, Missouri; that, pursuant to said agreement so made as aforesaid between plaintiff, said Patterson, and said Lyons, the said Patterson then and there sold and delivered to said Lyons said ninety-eight head of fat steers, and plaintiff then and there paid to him, the said Patterson, the said sum of sixty-six hundred ($6,600) dollars, the purchase price of said steers, and one hundred ($100) dollars for expenses to be paid in transporting said steers to Kansas City, and said Lyons delivered the same on board the cars of the Missouri Pacific Railroad Company in the town of Randall and county of Jewell and State of Kansas, consigned to defendants, at Kansas City, Missouri, and then and there received from said Missouri Pacific Railroad Company one bill of lading for cars # 325, # 6016, # 1214, # 8014, by which said company acknowledged receipt of said steers from him, the said Lyons, and agreed to transport and deliver the same to C. G. Means & Sons, at Kansas City, Missouri, which said bill of lading said Lyons then and there endorsed and delivered to plaintiff; a copy of said bill of lading, with the endorsement thereon, is hereto attached, marked Exhibit A, and made part of this petition;
54 that no bill of lading was actually issued to the said John Guthrie, but, by agreement made between the agent of said railroad company, said Lyons, and this plaintiff, two cars, # 5500 I. M. and # 5608 I. M., were loaded with sixteen (16) steers each and shipped to said C. G. Means & Sons, at Kansas City, Missouri, as consignees, and said John Guthrie, as consignor; that the four (4) cars for which the bills of lading issued in the name of said Lyons contained sixty-six steers in all; that it was then and there understood and agreed by and between said Missouri Pacific Railroad Company, said Lyons, and this plaintiff that plaintiff waived no claim or title to said steers or the money to be derived from the sale thereof by permitting them to be shipped in the name of said John Guthrie, but it was agreed between said parties that they should be delivered to said defendants along with the other steers, and that the proceeds thereof should be applied to the payment of the sum of sixty-six hundred ($6,600) dollars, the purchase price paid said Patterson for said steers, and the further sum of one hundred ($100) dollars advanced to said Lyons; that thereupon said Lyons drew his sight draft or bill of exchange on said defendants, dated on said

14th day of September, 1887, whereby he directed defendants to pay to his order the said sum of sixty-seven hundred ($6,700) dollars, at sight, at Kansas City, Missouri; and in consideration of said sum of money so advanced and paid by plaintiff, and in compliance with said agreement so made as aforesaid between him and plaintiff, and for the purpose of the pledge aforesaid and to more fully transfer the title to said ninety-eight (98) head of steers and the money to be received therefor to this plaintiff, said Lyons then and there assigned, by indorsement, and delivered said draft and bill of lading of said Missouri Pacific Railroad
55 Company to plaintiff; that said ninety-eight (98) head of steers were, by said Missouri Pacific Railroad Company, transported to Kansas City, Missouri, and to the stock yards in Kansas City, Kansas, and were, on the 15th day of September, 1887, at the hour of nine o'clock a. m., delivered to defendants, in accordance with the contract to so deliver the same, set out in said bill of lading, and made between plaintiff, said Lyons, and the agent of the said railroad company, at the town of Randall above referred to; that defendants accepted and then and there received the same, sold the same for account of said Lyons, and converted the proceeds thereof to their own use and benefit; that they have failed, neglected, and refused to pay plaintiff for said steers or any part thereof or render it any account of sales or of the amount received for same or the name of the party or parties to whom said steers were sold, though often requested by plaintiff so to do. Plaintiff further states that at the time said steers were delivered to the said defendants, to wit, on the 15th day of September, 1887, they were advised by the said C. S. Lyons that plaintiff had advanced the money to pay for the purchase price thereof on C. G. Means & Sons, and assigned it to plaintiff; that, by reason of the contract and agreement so made as aforesaid between plaintiff, said Lyons, and said Patterson, the payment of said sum of sixty-seven hundred ($6,700) dollars thereon by plaintiff to said Patterson and Lyons for said ninety-eight (98) head of steers, and the assignment and delivery of said draft and said bill of lading to plaintiff, plaintiff became the owner of said steers and entitled to the proceeds thereof; that said draft so assigned as aforesaid, together with said bill of lading so assigned as aforesaid, thereto attached, was, on the 15th day of September, 1887, at the hour of eleven o'clock a. m. of said day, by Ed. Kingsbury and Wood Hickman, messengers of the National Bank of Commerce of Kan-
56 sas City, Missouri, presented to the cashier of said C. G Means & Sons, at their office, in the Kansas City Stock Yards, for payment, and payment demanded; that said cashier, after examining said draft, directed said messengers to leave the same at the Kansas City Stock Yards Bank, and then and there promised to pay the same if they would so deposit it at said bank; that, pursuant to the directions so given and to said agreement so made between said cashier and said messengers, said draft was by the latter immediately deposited with the Kansas City Stock Yards Bank, and was by the messenger of said bank, at 2.30 p. m. of said day, again presented at the office of defendants, C. G. Means & Sons, to them

for payment, and payment was by them then and there refused and said draft then and there protested for non-payment; that at the time said draft and bill of lading were first presented to the defendants for payment as aforesaid said steers had not been by them disposed of, and were at the time being received by them from the cars of the Missouri Pacific Railroad Company; that a copy of said draft, with the endorsements thereon, is hereto attached, marked Exhibit B, and made part of this petition; that for more than twelve (12) months previous to said 14th day of September, 1887, said Lyons had been engaged in shipping stock to defendants and accustomed to drawing drafts in favor of plaintiff and other persons against such shipments and transferring the bills of lading and stock so shipped to the parties holding such drafts and bills of lading on account of such shipments; that defendants, previous to said 15th day of September, 1887, were accustomed to and did pay all such drafts so drawn on them by said Lyons and in favor of plaintiff and other persons, and had never refused payment of any of the same. Plaintiff further states that defendants have not paid and have re-
57 fused to pay said sum of sixty-seven hundred ($6,700) dollars to plaintiff or any part thereof or to any one for its use, though requested so to do, and the same is yet due and unpaid; that the cost of protest paid out by plaintiff is four ($4) dollars; that defendants are non-residents of this State, and said bill of exchange or draft was drawn on them, payable within the jurisdiction of the United States and without the jurisdiction of the State of Kansas. A copy of the notice and certificate of presentation, refusal of payment, and protest of said draft served on plaintiff is hereto attached, marked Exhibit C, and made part of this petition.

Wherefore plaintiff prays judgment for the sum of six thousand and seven hundred ($6,700) dollars, the purchase price of said steers, the sum of four ($4) dollars, protest fees paid out and expended, and the further sum of four hundred and two ($402) dollars, damages on account of said protest, with interest thereon from September 15th, 1887; and that it may, on account of the matters and grounds set forth and contained in the affidavit of plaintiff's agent filed herein, have an attachment against the property of defendants, and for other proper relief.

CRITTENDEN, McDOUGAL & STILES AND
CALDWELL, ELLIS & COOK,
Attorneys for Plaintiff.

Endorsed: No. 6078. Bank of Randall *vs.* C. G. Means & Sons. Amended petition. Filed Dec. 1, 1887. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

58 In the Circuit Court of the United States for the District of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners as C. G. Means & Sons, Defendants.

Answer to Amended Petition.

Now come said defendants and, for answer to the amended petition filed here, say—

First. They deny each and every statement, averment, and allegation therein contained except such as is hereinafter expressly admitted and confessed.

Second. For further answer defendants say they admit that they are now and were at the times mentioned in said petition partners doing business under the style and firm name of C. G. Means & Sons. They admit that said Bank of Randall was and is now a savings-bank corporation duly chartered, organized, and incorporated under the laws of the State of Kansas and as such had authority only to transact and prosecute the business of a savings bank, as provided by the terms, conditions, and restrictions of sec. 127, article 16, chap. 23, Compiled Laws of 1885, but specially denies [deny] that said plaintiff had any right, power, or authority to engage in the transaction set forth and contained in said amended petition.

For further answer these defendants say that prior to the shipment of said cattle mentioned and referred to in plaintiff's amended petition these defendants advanced to C. S. Lyons a large sum of money, to wit, exceeding the sum of $7,500, to be used by
59 said C. S. Lyons for the purpose of buying cattle and stock for these defendants, with the understanding and agreement that when purchased said cattle should, by said C. S. Lyons, be delivered to these defendants, to be sold by these defendants for and on account of such advances so made to said C. S. Lyons by these defendants, and were to be so delivered on board of the cars at Randall, Kansas.

That thereafter said cattle were delivered to these defendants at Randall on board of the cars, and four cars thereof were consigned to these defendants, as per said bill of lading, and no bill of lading was issued for said two cars so shipped by said Guthrie, but all of said cattle, at the time they were delivered to these defendants on said cars at Randall, were the property of these defendants and in the possession of these defendants before said bill of lading was delivered to said plaintiff, if it ever was; that said Lyons and said Guthrie accompanied said cattle from Randall, Kansas, to Kansas City and remained with them while they were so in transit, and when they reached Kansas City these defendants took them from the cars in which they had been loaded with the knowledge, consent, and authority of each said Lyons and said Guthrie, and with their knowledge, consent, and authority sold the same and applied the proceeds of such sale in payment of the amount so advanced by

these defendants to said C. S. Lyons as aforesaid; and these defendants specially deny that said bill of lading was ever endorsed to the said plaintiff, or that said plaintiff, by virtue of its corporate power, had any right or authority to receive the same or take any title thereto or the property thereby represented.

And these defendants further say that they had no knowledge or notice that said C. S. Lyons had drawn any draft on these defendants for any sum or sums whatever until said cattle had been received by these defendants and sold and the proceeds applied
60 as aforesaid.

That said draft was not drawn with the knowledge, consent, or authority of these defendants or by any one by them authorized; and these defendants say that, as to said two cars of cattle, no bill of lading was ever issued by said railroad company, and no delivery thereof, symbolic or otherwise, was ever made to said plaintiff, and said plaintiff did not at any time have possession of said cattle or any thereof, and these defendants had no notice that plaintiff claimed to have any interest therein or lien thereon.

Wherefore the defendants pray judgment for costs.

WAGGENER, MARTIN & ORR,
Attorneys for Defendants.

THE DISTRICT OF MISSOURI, } ss:
County of Jackson, }

C. G. Means, being first duly sworn, deposes and says that he is one of the defendants herein; and affiant says that he has read and knows the contents of the within and foregoing answer; that the matters and things therein stated are true.

C. G. MEANS.

Subscribed and sworn to before me this 18th day of January, A. D. 1888.

[SEAL.] WARREN WATSON,
United States Commissioner.

[Endorsed:] Law docket No. 6078. Bank of Randall *vs.* C. G. Means & Sons. In circuit court of the U. S. *court* for district of Kansas. Answer to amended petition. Filed Jan. 20th, 1888. A. S. Thomas, clerk. Attorneys for defendants, Waggener, Martin & Orr.

61 In the Circuit Court of the United States for the District of Kansas.

THE BANK OF RANDALL, Plaintiff,
against
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Doing Business under the Firm Name of C. G. Means and Sons, Defendants.

Comes now the plaintiff herein and, for replication to defendants' answer, denies each and every allegation therein contained.

CRITTENDEN, McDOUGAL & STILES,
Attorneys for Plaintiff.

Endorsed: No. 6078. The Bank of Randall *vs.* C. G. Means & Sons. Replication. Filed April 2, 1888. A. S. Thomas, clerk, by Frank H. Holt, deputy.

62 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 26th day of November, A. D. 1888, proceedings were had and appear of record in words and figures following, to wit:

THURSDAY, *Dec.* 27, 1888.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Businesss as C. G. Means & Sons, Defendants. } 6078.

Now come the parties herein, same as on yesterday, and, the jurors empaneled herein being called and all being present, the trial of this cause is proceeded with, and the jury, having heard the evidence, arguments of counsel, and instructions of the court, render their verdict herein, which is in the words and figures following, to wit: "In the circuit court of the United States for the district of Kansas. The Bank of Randall, plaintiff, *vs.* C. G. Means & Sons, defendants. Case No. 6078. We, the jury in the above-entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, and assess its damages at $6,681.55. S. M. Husted, foreman."

It is therefore now by the court here considered, ordered, and adjudged that the plaintiff herein, The Bank of Randall, have and recover of and from the defendants herein, C. G. Means. W. W. Means, and C. H. Means, partners doing business as C. G. Means & Sons, the sum of six thousand six hundred and eighty-one and $\frac{55}{100}$ dollars, and also its costs in this action expended, and that execution issue therefor.

63 SATURDAY, *January* 26, 1889.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business as C. G. Means & Sons, Defendants. } 6078.

The defendants' motion for a new trial herein came on to be heard and was argued by counsel; on consideration whereof the court overrules said motion, defendant excepting. Defendants is [are] given 30 days from this date to file bill of exceptions. Execution is stayed for 30 days from this date. Supersedeas bond is fixed at $10,000.

MONDAY, *Feb'y* 4, 1889.

THE BANK OF RANDALL
vs.
C. G. MEANS & SONS. } 6078.

Leave is hereby given defendants by the court to file exceptions herein by March 5, 1889.

64 In the Circuit Court of the United States for the District of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business under the Firm Name and Style of C. G. Means & Sons, Defendants.

Defendants' Bill of Exceptions.

Be it remembered that upon the above-entitled cause being called for trial in said court, before Hon. C. G. Foster, district judge within and for the district of Kansas, on the 26th day of December, A. D. 1888, the defendants appeared by Hon. B. P. Waggener, their attorney, and thereon filed an affidavit for the continuance of said cause in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS & SONS, Defendants.

THE COUNTY OF SHAWNEE,
District of Kansas, } *ss:*

C. G. Means, being first duly sworn, deposes and says that he is one of the defendants herein; that defendants cannot at this time safely proceed to trial for the want of material testimony, which they have been unable to procure.

That one J. K. McClain is an important and material wit-
65 ness; that McClain has been duly subpœnaed, but, as shown by the return of the officer, he cannot attend at this term of court, for the reason that he has just had his arm amputated and is confined to his bed.

That defendants can prove by said McClain that prior to the shipment of the stock sued for herein said S. C. Lyons was indebted to said witness in the sum of exceeding $2,500.00, and that said indebtedness was paid by said defendants out of the proceeds of the sale of said stock, which payment was made to witness after said cattle had been received by defendants and during the same day that said cattle were received.

Affiant says that he cannot prove the same facts by any other witness, and that the same are true, and he expects to have the testimony of said witness by the next term of this court. Affiant further says that the defendants first heard of the injury to said witness and of his inability to attend court on this December 26th, 1888.

Affiant further says that Robert Wells is an important and material witness for the defendants, and without whose testimony he cannot safely proceed to trial at this term of court; that said Robert Wells, until quite recently, resided at Lyons, Kansas, and as soon as this case was set for trial affiant caused a subpœna to be duly issued for him, and he learned this a. m. that it had been returned "not found" and the notice not served, and his whereabouts are at this time unknown to defendants.

Affiant further says that he expects to be able to prove by said Wells that on the day said cattle were received in Kansas City, Missouri, the same were then in the possession and custody of said C. S. Lyons; that one Robert Patterson was also at said time at Kansas City, having come with said Lyons on the same train with said cattle.

66 Affiant says he expects to further prove by said witness that he was present during a conversation on this day between said Patterson and affiant, and heard said Patterson tell this affiant that said cattle were Lyon's cattle; that he, Patterson, had sold them to Lyon and had his money.

Affiant says that he cannot prove said facts by any other witness within his knowledge.

(Signed) C. G. MEANS.

Subscribed and sworn to before me this 26th day of December, 1888.

(Signed) GEO. F. SHARITT,
Clerk U. S. Circuit Court, District of Kansas.

Forthwith thereon the said attorney presented his application that said cause be passed for a few days, owing to the sudden and serious illness of the said attorney, and therewith presented and filed in support thereof the affidavit of said attorney, which was in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS & SONS, Defendants.

UNITED STATES OF AMERICA,
District of Kansas, } ss:

B. P. Waggener, being first duly sworn, deposes and says that since the institution of this action he has had sole and exclusive charge of the defense therein, and came to Topeka on last evening

to attend said trial; that since he has been in Topeka he has been attacked with a complaint commonly called winter cholera;
67 that so severe has been the attack that affiant was unable to sleep and has not slept any during the last twenty-four hours; that he is now so weak and debilitated as to render — almost impossible for affiant to remain in the court-room and out of bed; that in justice to himself he should now be in bed under the care of a physician; that said complaint generally requires from five to ten days to run its course.

Affiant respectfully asks that this case be passed for ten days or over the term.

(Signed) B. P. WAGGENER.

[SEAL.] Subscribed and sworn to before me this 26th day of December, 1888.

GEO. F. SHARITT,
Cl'k United States Circuit C't, District of Kansas.

Endorsed: No. 6078. Affidavit. Filed Dec. 26th, 1888. Geo. F. Sharitt, clerk.

And said affidavits being submitted to the court, and the court, having heard the same, and the premises being fully seen and understood, did intimate that the defendants were entitled to a continuance because of the absence of the witness, J. K. McClain, mentioned in the first affidavit heretofore copied; and thereupon the said plaintiff announced that it would admit the said affidavit of the testimony of said absent witness, J. K. McClain, as the deposition of said witness; and thereupon the court did overrule and deny the said application of the said defendants for a continuance; to which ruling and decision the said defendants then and there excepted; and thereupon the court did overrule, deny, and refuse the said defendants' application to have said cause passed for the reason stated in said affidavit of the Hon. B. P. Waggener, hereinbefore copied; to which ruling and decision of the court the defendants then and there excepted; and thereupon, upon the convening
68 of court on the afternoon of said day, the said defendants filed in said court and cause the affidavit of C. G. Means for a continuance of said cause; which affidavit is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS *et al.*, Partners as C. G. Means & Sons, Defendants.

UNITED STATES OF AMERICA,
State and District of Kansas, } *ss:*

C. G. Means, being duly sworn, upon his oath states that he is one of the defendants in the above-entitled cause, and has the sole

charge thereof in behalf of the defendants in the employment of counsel and in consulting and advising with such counsel in the preparation of said cause for trial; that he has not counselled or advised with any other attorney now in the State of Kansas, or who can be obtained at this time to attend this trial, in relation thereto other than Hon. B. P. Waggener, and that the amount claimed by the plaintiff in said cause exceeds the sum of seven thousand dollars ($7,000.00), exclusive of costs at this time; that since the filing of the affidavit of said B. P. Waggener, this a. m., Dr. Henry W. Roby, of Topeka, Kansas, has visited the said B. P. Waggener professionally, and has made a certificate as such attending physician, which is attached hereto, marked "A," and made a part hereof; that defendants cannot safely proceed to trial at this time, because they cannot now be represented by attorneys in this action who are familiar therewith or fully informed as to the rights and claims of the defendants therein, and if said attorney for defendants
69 should be able to attend it will be at the great risk of his health and in a physical condition which will prevent a full and fair presentation of the interests of the defendants.

(Signed) C. G. MEANS.

Subscribed and sworn to before me this 26th day of December, 1888.

[SEAL.] (Signed) GEO. F. SHARITT,
Clk U. S. Circuit Court, District of Kansas.

Endorsed: No. 6078. Affidavit. Filed Dec. 26, 1888. Geo. F. Sharitt, clerk.

"A."

HOTEL THROOP, TOPEKA, *Dec. 26th*, 1888.

I have just visited Hon. B. P. Waggener, of Atchison, in his room in Hotel Throop, and find him in such a condition of illness as to render him entirely unfit for work.

(Signed) HENRY W. ROBY, M. D.

Which affidavit and application, being submitted to and considered by the court, was overruled and denied and a continuance of said cause refused to the defendants; to which ruling and decision of the court the defendants then and there excepted at the time; and thereupon a jury was impaneled in said cause, the defendants appearing therefor by H. M. Jackson, attorney, upon the trial of said cause, and said plaintiff offered and tendered in support of the issues upon its part the following evidence, to wit:

Dr. W. S. WOODS, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Judge STILES:

70 Q. Where do you reside?
A. At Kansas City.

Q. What connection have you, if any, with the National Bank of Commerce at Kansas City?

A. I am president of the bank.

Q. Were you in that position at the time this draft referred to you was received?

A. Yes, sir.

Q. You may state whether a draft drawn by C. S. Lyons upon Means & Sons came to your bank for collection; and, if so, when and the amount of the draft, as nearly as you can recollect.

A. I think it was about the middle of September, 1887.

Q. Do you remember the amount of the draft?

A. I do not.

Q. By whom was it sent to your bank?

A. It came to us from the Bank of Randall for collection and credit.

Q. Did that bank keep an account with you?

A. Yes, sir.

Q. Do they do their exchange business through you at Kansas City?

A. Yes, sir.

Q. Upon whom was it drawn?

A. Upon Means & Sons.

Q. I believe you said you did not recollect the amount?

A. I do not recollect the amount; six or seven thousand dollars.

Q. Do you remember what was done by the bank in the way of collecting it, in a general way?

A. It took the ordinary course of business. When the mail was opened it was delivered to the collector to take to the stock yards and presented for payment.

71 Q. To whom?

A. To the party upon whom it was drawn.

Judge JACKSON: We object to the evidence. He prefaces that by the statement that it took the ordinary course of business without stating whether he testifies as to the other facts from his own knowledge or simply from custom.

The WITNESS: I stated that as a matter of fact.

Judge JACKSON:

Q. That it was taken there?

A. Yes, sir; I did not follow it down there; it started from the bank.

Q. What were the names of your collectors who went with the draft for collection?

A. Their names are Kingsbury and Hickman, I think.

Q. Do you know whether the draft was paid—accepted and paid—by Means & Sons, or the demand refused and the draft dishonored?

A. The draft went to protest.

Q. Payment was refused?

A. Yes, sir.

Q. You may now state whether, subsequently to the dishonor of the draft and the refusal of payment, you went in person to Means

& Sons; and, if so, you may state where their office was kept and what took place in that interview.

A. Well, the draft went to protest. It was a good, big draft. I felt it to be a matter of some importance, and the next morning I went down to see Mr. Means about it myself. I went down to Mr. Means' office; he was out. I remained a little while until he came in. I saw him and had a conversation — him.

Q. You may state the substance of that conversation, as nearly as you can recollect it.

72 A. I asked him if he was going to pay the draft. He said he was not. I asked him the reason why. I cannot repeat the words, but the substance was that Mr. Lyons owed him the money, and that it paid his own debt.

Q. The substance of it was what?

A. That Lyons owed him the money that the cattle sold for, and that he had paid himself out of the money that the cattle sold for. I think he said that there was a balance due him from Lyons.

Q. What, if anything, did he say in reference to the character of the debt of Lyons to him—whether it was an old debt?

A. I cannot repeat the words, but he made the impression upon my mind that Lyons had been owing him some money, probably had been shipping to him, and that this was an opportunity of paying his debt, and he was going to do it. He wanted to pay himself.

Q. Did I understand you to say that after applying the proceeds of the sale of the cattle on the old debt that there was still a balance due him from Lyons?

A. Yes, sir; I understood him that Lyons still owed him some money.

Q. Do you recollect the amount?

A. I think it was $60 or $70; either $61 or $71.

Q. Did Mr. Means say anything about any other claim?

A. Not a word.

Q. About a claim of one McLean?

A. Not to me.

Cross-examination by Judge JACKSON:

Q. Doctor, you spoke of this draft being presented and payment refused. What do you know of your own knowledge about that?

73 A. They say we do not know anything except what we see. I was not there. We do our business through the Stock Yards Bank—that is to say, we do our collecting there. We send our drafts down there for payment, and if not paid they are protested. When a draft comes back protested under the seal of a notary, that is the only way that I know that it was not paid.

Q. Therefore you testify in regard to its being sent to Means and payment being refused and its being protested. When you testify to that it is simply what your officers learned?

A. I was not there. I know it like I know a great many other things, but I was not present.

Q. You say it is your custom to leave these matters, when not paid on presentation, at the Stock Yards Bank to collect?

A. Yes, that is the ordinary course.

Q. Was that done in this case?

A. I could not say. I was not there. There are other witnesses who will testify as to that. I know it only by the evidence of other parties. I was not present to see it done.

Q. Do you know whether the draft in this case was presented by your collector or by a notary connected with your bank or a notary connected with some other bank?

A. I only know that by what my young man tells me. I was not there personally.

Q. Then I will ask you if it is not true that you do leave drafts for collection at the Stock Yards Bank regularly?

A. It depends somewhat upon our instructions in the matter.

Q. Did you have any instructions in reference to this case?

A. I had none. I could not say. There might have been instructions to the cashier. I could not say about that.

74 Q. If it was left with the Stock Yards Bank for subsequent presentation, was that in accordance with your ordinary mode of doing business?

A. I could not say as to that. I am president of the bank and do not attend to that business. The cashier is here and will testify as to that.

Q. Do you know whether any drafts or papers are left by your bank with the Stock Yards Bank for collection?

A. I do; I know it in one sense. I was never there and saw it done.

Q. If it was done in this case, then it was in your usual and ordinary course of business?

A. I did not say so.

Q. Well, was it?

A. I do not know. I do not attend to that part of the business.

Q. You do not know whether it was the custom of your bank to collect through the Stock Yards Bank or not?

A. I do not claim to know anything on that subject.

Q. What did you mean when you testified that it was your usual custom?

A. I testified that it was done, but not as to what was our usual custom.

Q. Did you not also testify that it was left there for collection?

A. No, I guess not.

Q. You do not testify as to that. You do not know anything about that?

A. I was not there to see it done. I do not know whether it was presented at all or not.

Q. You cannot tell whether it is customary in your bank to leave papers there for collection?

A. I do not undertake to say.

Q. Could you state if you did undertake to?

A. No, I could not state. I do not know. It is a part of the business that I give no attention to at all.

75 Q. What was it that Mr. Means said to you about this draft when you called on him the following day?

A. I have stated what he said.

Q. I ask you to state now, if you will, what he said to you at that time?

A. The object of my visit there was——

Q. Just state the conversation, if you will.

A. In the conversation Mr. Means stated to me that he was not going to pay the draft, and the reason was that Lyons owed him the money and he was going to pay himself. I do not know whether they are the words or not, but that is the substance.

Q. Was there anything else said in that conversation on the subject? See if you can recollect anything else that was said.

A. We talked probably thirty minutes.

Q. Can you recollect anything else that was said?

A. I do not know that I can, just now especially.

Q. That is all you can recollect, then, of that conversation that occupied about thirty minutes?

A. Yes, sir.

Redirect examination by Judge STILES:

Q. What was Mr. Means' action when he told you that he had taken that opportunity to pay the debt?

A. Well, Mr. Means and I knew each other pretty well. He kind of smiled.

Judge JACKSON:

Q. What do you mean by "kind of smiled?"

A. Just what you mean when you use it exactly. I just used it in its ordinary English sense.

Q. That was all?

A. I did not say that was all.

76 Q. You were asked to state what his conduct and appearance was at the time he made that statement?

A. That embraces the idea, so far as I can recollect.

Q. Then, that is all you have to say about his appearance, is it?

A. Yes, that is all.

Q. Where did you go to see Means & Sons? Where was their office?

A. At the stock yards in Kansas City; at the stock exchange.

Q. Do you know who is the cashier or book-keeper, as he is called?

A. I do not know.

Q. It is in the same building with the Stock Exchange Bank, or very close to it, is it not?

A. Yes, sir; just across the hall.

Judge JACKSON:

Q. What county is that Exchange Bank in?

A. I think it is just across the line in Kansas.

H. C. SCWHITZBEL, a witness called on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination by Judge STILES:

Q. Where do you reside?
A. Kansas City, Mo.
Q. What is your occupation?
A. I am assistant cashier of the Bank of Commerce.
Q. How long have you been in that bank?
A. About ten or eleven years.

Q. Were you assistant cashier of the bank at the time that
77 this draft drawn by Lyons on Means and Sons—at the time the draft in controversy was received by the bank?

A. I was.
Q. Are you able to state about when that was?
A. No; but I can tell by the books at the time. I think it was about the middle of September, 1887.
Q. What was done with the draft when it was received?
A. The draft was received by us in the mail, in the morning, and opened and passed over to the mail-teller, who sorted it out and registered certain items that make up what we call the Stock Yards Bank collections, and it was sent there by a collector to collect it. We collect it if we can, and if we cannot collect it it is protested, and among these items was this item sent down there by the collector that day.
Q. You go to the offices, places of business, or places where the persons are upon whom the drafts are drawn?
A. Yes, sir; and then they are placed in the Stock Yards Bank to our account, if they are collected.
Q. Your collectors then go first to the persons upon whom the draft is drawn?
A. Yes, sir.
Q. You may state whether this particular draft, the one in question, was placed in the hand of the collector of your bank for the purpose of being presented at the counter of Means & Sons.
A. Yes, it was.
Q. Do you know who the collector was?
A. Yes; Mr. Kingsbury and Mr. Hickman.
Q. Why was there more than one?
A. Mr. Hickman was a new man that had never been in the bank before, and they both went together to show him his duties in the bank.

Q. Was the draft paid?
78 A. No, sir; it was not paid.
Q. What time did you give this draft to these collectors to be presented to Means and Sons or at their counter or place of business?
A. Between the hours of nine and ten o'clock; I could not be positive as to that.
Q. Was the draft protested?
A. Yes, sir; it was.

Q. You may look at that draft and see if it be the one to which we have been referring.

A. Yes, sir; to the best of my recollection, that is the draft.

Q. Was it accompanied by any certificate of protest when it came back to the bank?

A. Well, I couldn't say positively, because it does not come back into my hands.

Q. I want to ask you if, when the draft came into the possession of the bank through the mail, there was anything attached to it or accompanying it?

A. Well, if my memory is correct there was a bill of lading attached to it, but it has been a little over a year ago, and I could not positively swear that it was there at that time.

Q. Your impressions are, however, that there was a bill of lading attached to the draft?

A. Yes, sir; that is my impression.

Q. You may look at that draft and see if it be the one (showing paper to witness).

A. Yes, sir; that is the one.

Q. You may look at that bill of lading, with the endorsements on it, and see if it will refresh your memory. (Witness examines paper.)

79 A. Well, it don't, because there are so many of these items come to me that I would not be able to tell.

Q. Are you able to state whether there was a bill of lading?

A. I would not say positively; my impression is that there was a bill of lading attached to the draft.

Q. If there was a bill of lading state whether or not it was sent with the draft.

A. Yes; if there was a bill of lading it was attached to the draft. It did not come in two separate parcels.

Q. If there was a bill of lading attached to the draft or accompanying it, was that delivered to the collectors who were sent to present the draft?

A. Yes; the bill of lading, if it was attached to the draft, was sent right with it, unless it was taken off by some one handling it subsequently to me.

Cross-examination by Judge JACKSON:

Q. Did you say that you received the draft that morning?

A. Yes, sir.

Q. It came in the regular mail?

A. Yes, sir.

Q. Did you open the mail?

A. I could not say whether I opened the very letter that contained that, but it went through my hands.

Q. What do you mean by going through your hands?

A. I mean that either I or some of the other young men opened the letters, and I went through them and sorted them by credits. I sorted the letters out, and a letter like that would go to the mail-teller, as we call it, for his action in the matter.

80 Q. Do you have any distinct recollection of opening this letter at that time or seeing it at that time?

A. No, sir; I could not say that; no, sir.

Q. Do you remember of seeing this draft on that occasion, on the morning of that day to which you refer?

A. No; I could not say; only from the book—from the memorandum on our records. I wish to make a statement, however, that there are records kept by our bank very carefully in which such transactions are noted.

Q. You do not know of your own knowledge that you ever saw this draft on that day?

A. Well, I should say, as positively as records can prove anything, that I did; yes, sir.

Q. I am asking you as to your personal knowledge of this matter. Can you testify from your personal knowledge, without reference to your records, that you saw that draft on that day?

A. I could not state positively that I did or did not; it was a year ago.

Q. Can you say that you saw that bill of lading on that day?

A. No; I could not say whether it was attached to the draft or not, because I could not be positive about that.

Q. Do you have any distinct recollection at all of passing that draft to any collector for collection?

A. No, sir; I do not, because they do not go from me to the collector. Drafts go through other channels before they get to him.

Q. Do you have any distinct recollection or any recollection of that draft being returned to the bank?

A. Yes; it is generally made known to me by the persons who have had it in charge, if anything like that occurs, and the

81 usual course is to telegraph to the bank who drew it.

Q. Have you any recollection that that draft was returned to your bank on that day or on the following day?

A. It was not returned to us that day, to my recollection.

Q. Was it on the following day?

A. It was the following day.

Q. Do you remember seeing the draft?

A. I do not.

Q. Did you see it after it was returned to the bank?

A. I could not say about that.

Q. Do you have any recollection that it was at any time returned to the bank after it was received?

A. I have this recollection: My individual recollection is that the man who has that in charge told me that the draft came back. I do not think it came to my sight.

Q. Now, then, do you know anything of your own knowledge of that draft being returned?

A. Only what was told me by those who handled it after it was out of my hands.

Q. You did not see it yourself?

A. I could not say positively about that.

Q. You do not know that this draft was the same draft that he spoke of, do you?

A. No, sir.

Q. You do not know that there was a bill of lading attached to it at that time?

A. No; I could not say positively.

82 Mr. CONNELLY, a witness called on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination by Judge STILES:

Q. Where do you reside?

A. Kansas City, Mo.

Q. What is your business?

A. Cashier Kansas City Stock Yards Bank.

Q. Did you ever see that draft (showing draft and bill of lading to witness) and bill of lading before?

A. There are certain marks here that enable me to say that I have, and I think, also, that I could say without the marks that I have seen that draft before.

Q. How about the bill of lading?

A. I do not recollect that.

Q. You are not able to say whether it was attached or not?

A. I am not able to say that I ever saw the bill of lading or whether there was a bill of lading attached to the draft at that time. I think I saw it. It is evidently the same one that I had in mind.

Q. You may now state, Mr. Connelly, under what circumstances you saw this draft, by whom it was delivered to the bank, your bank, if you know.

A. I do not know that. I do not know how it was delivered at our bank. I have—well, I speak now from my personal knowledge, I do not know but what the draft came to me as cashier directly—passed through our bank in the course of business. It came to my hands, not as cashier but as notary, on the day of the date indicated upon that draft.

Q. Now, what is that date—what date did it come into your hands?

83 A. I find here written across the face of this draft, "Protested for non-payment, September 15th, 1887." That would be the date that it came into my hands.

Q. You were there in the bank—an officer of the bank—at that time?

A. Yes, sir.

Q. In what capacity at that time?

A. I think I was cashier; if not, I was assistant cashier; I would not be positive as to that.

Q. You received the draft from the Stock Yards Bank?

A. Yes, sir.

Q. Do you recollect which one of the officers handed it to you, if either one?

A. No; not specifically the particular officer that handed it to me, except there is one man whose duty it is to do it.

Q. Who is that?

A. That would be the assistant cashier or, at that time, perhaps the teller, who was in charge of the routine work of the office.

Q. You were in the bank either as cashier or assistant cashier, and you were handed this draft either by the teller or cashier of your bank for final presentment and protest for non-payment?

A. Yes, sir.

Q. Now, state what you did when this draft was so handed to you—what you did with it.

A. I went to the office of Means & Sons and presented it for payment and received their answer to return it.

Q. Did they pay it?

A. No, sir.

Q. Did they refuse to pay it?

A. Yes, sir; they refused to pay it.

84 Q. What did you do with it then?

A. I protested it for non-payment.

Q. Is that your certificate of protest?

A. It is, sir.

Q. Do you know how early in the day the draft was received at your bank?

A. I do not.

Q. How early in the day was it or at what time was it that you presented it to Means & Sons' counter for payment?

A. It must have been between three and four o'clock, for certain reasons that I can state if required to do so. That is as near as I can locate the time of presentation—possibly three to half past four in the afternoon.

Q. You sent the notices referred to in this certificate of protest?

A. Yes, sir.

Judge STILES: We offer now in evidence the draft referred to as Exhibit "A," the same being draft marked Exhibit B, attached to and made part of the amended petition, and the notice of protest as Exhibit "B," referred to in the testimony; a copy of which protest and notice is attached to the annexed petition as "Exhibit C."

Judge JACKSON: We object to the certificate of protest, if your honor please, and I will state it now, so that the objection may be passed upon.

Objection is overruled, defendants excepting.

Q. How near is Means & Sons' office to your bank?

A. Within a few steps. Our bank office is on the first floor of the exchange and Means & Sons' office is also on the first floor, and I should calculate from the door of the bank to Means' door would be about fifteen or twenty steps.

85 Q. You do not know what time of day the draft came into your hands?

A. No, sir; I do not.

Q. Had there been any presentment of it before from your bank or by your bank before you presented it?

A. Speaking from what I saw, I could not say, but otherwise I know as well as I know anything that there was such a presentment.

Q. You know that it was presented before?

A. I never saw our collector present it, but I know it was presented.

Q. About what time?

A. It should have been presented at Means' office by our collector between two and three o'clock.

Q. And you know it was presented?

(No answer.)

—. What time does your bank close?

A. Four o'clock.

Q. And it was between two and three o'clock when it was presented by your clerk at the counter of the bank and then by you presented again at the time of protest?

A. Yes, sir.

Q. Your bank and the office of Means & Company is in what building?

A. In the Live Stock Exchange building.

Q. There are a number of offices in the building of commission men and dealers, are there not?

A. There are a large number of offices on the three floors.

Q. You say that Means' office was the first door next to your bank?

A. Yes; it could be called so. It is on the same side of the building in a direct line going west.

Q. So that you can step right out of your door and enter right west into Means' office?

86 A. Yes, sir; just a step into Means' office.

Cross-examination by Judge JACKSON:

Q. You were asked a few minutes ago if your collector presented the draft between two and three o'clock, and you stated that he did. Do you know that your collector went to that office at all with that draft, of your own knowledge?

A. I said of my own knowledge I did not know.

Q. I so understood you.

A. Of my own knowledge, I do not.

Q. Did you mean to answer the question that was asked you, that your clerk did present it at the counter of Means & Sons, affirmatively?

A. I would answer it affirmatively, although not of my own personal knowledge.

Q. What do you mean when you say that you know it; that you were told so?

A. Yes, sir.

Q. Do you know it from any other fact than that some one told you that it was so presented?

A. The other fact is that the draft was handed to me with that information.

Q. With that statement. Now, then, if I understand you, you handed this draft to the collector or it was handed to the collector in your presence?

A. I will tell you how that business was done.

Q. No; I am asking you as to the fact.

A. I did not see that done; that is done every day.

Q. Do you know, then, that this particular draft was at that particular time put in the hands of the collector?

87 A. In the manner I stated, I know it; I do not know it personally.

Q. Did you see him have it?

A. I do not know that I did.

Q. Did you see him return it?

A. I could not say that I did.

Q. Do you know anything about it?

A. Only what he said.

Q. Do you know anything about it from your own knowledge of this particular transaction?

A. No, sir.

Q. Then you do not know, except from hearsay, that it was presented at Means & Sons' place of business that afternoon between two and three o'clock?

A. Literally, I suppose that would be the fact.

By the COURT: There is no evidence from this witness that it was presented at any other time except when he presented it.

Judge JACKSON:

Q. To whom did you present that draft for payment between three and half past four?

A. I could not recollect the particular individual; it was to some member of the firm, however; I do not know that I recollect which one it was, but it was to a member of the firm.

Q. You say you do not know whether this bill of lading was attached to the draft at that time?

A. I do not recollect anything about the bill of lading.

Redirect examination by Judge STILES:

Q. You may state what your custom was and the facts fully
88 why you say that you know, without your own knowledge, that the clerk had presented that draft prior to the time when you presented it, to wit, about two o'clock or between two and three o'clock.

A. The Kansas City Stock Yards Bank is located in the Live Stock Exchange, and it receives the business of all the banks in Kansas City on the stock yards—in other words, drafts drawn for shipments of live stock. The banks in the city send those by messengers to the yards in the morning, and the late mail, if there is anything, they usually send it down through the clearing-house or

by the clearing-house clerk—such drafts as these that messengers are not able to collect in the morning. These are handed to our teller, who lists them under the heading of each bank. A draft from the National Bank of Commerce would be listed under the caption of the National Bank of Commerce; and then about two o'clock our collector goes through the building with all those drafts and presents them for payment and gets checks in payment; but where payment is refused he returns the draft not paid; then it is turned over to the notary for protest; that is a protest item.

Q. Was this so turned over to you?

A. Yes, sir.

Q. Is that the daily usual custom of the bank?

A. That is the daily routine custom of the Stock Yards Bank.

Q. You say the clerk made the statement you refer to at the time he returned the draft to you for protest?

I object to that. He has already stated that three or four times.

Q. Who was Mr. Means' book-keeper, clerk, cashier, or whatever you call him?

A. Mr. Keily is the gentleman who is in charge of his office. I think that his title would be book-keeper.

Q. You say he was in charge of the office?

89 A. He is his accountant, and seems to be in charge of his accounting department.

Q. How long has he been so in charge?

A. I think for several years past.

Q. To whom did you make this presentment?

A. I answered a moment ago that I presented it to one of the firm of C. G. Means & Sons. My presentation was to a member of the firm.

Q. Do you know whether Keily was there at the time of the presentation of this draft?

(No answer.)

ED. KINGSBURY, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination by Judge STILES:

Q. What is your age?

A. 18 is my age.

Q. Where do you live?

A. I live in Kansas City.

Q. What is your occupation?

A. I am employed in the National Bank of Commerce.

Q. How long have you been in the employment of the National Bank of Commerce?

A. About two years.

Q. Were you in the employment of the National Bank of Commerce at the time this draft was received by the bank, on the 15th of September, 1887?

A. Yes, sir.

90 Q. You may state whether that draft came into your hands; and, if so, when and with what instructions?

A. It came into my hands; it came into my hands through the mail-teller to me; my instructions were to collect it.

Q. Where was the collection to be made?

A. At the Stock Yards Exchange—at the Stock Yards Exchange Bank.

Q. Was Means & Co.'s office in the Stock Yards Exchange?

A. Yes, sir.

Q. You were to collect it at their office?

A. Yes, sir; if they wanted to pay it there; if they did not I was to leave it at the bank.

Q. You may state what time the draft thus came into your hands as collector of the Bank of Commerce.

A. It came in before 10 o'clock in the morning.

Q. State what you did with it in the way of making an effort to collect.

A. I presented it to the man behind the counter.

Q. Where did you go with it there?

A. To C. G. Means' office, in the Stock Yards building.

Q. What did you do with it then?

A. I presented it to the book-keeper or cashier; I do not know who he was.

Q. Through the window of the counter?

A. Yes, sir.

Q. Means' office has a counter and a window and an opening in the window?

A. Yes, sir.

Q. Did you present it through this window to the person in charge of the office?

A. Yes, sir.

91 Q. To Mr. Keily, was it?

A. Yes, sir; to Mr. Keily.

Q. State whether or not he was in charge of Means & Co.'s office.

A. He was the only one in there at that time.

Q. State whether or not you—what did you do, now, in the way of presentment?

A. I just gave him the draft, and he looked at it, read it, and told me to leave it in the bank for collection.

Q. State whether or not you gave him the bill of lading.

A. The bill of lading was on the back of the draft—attached to it—pinned on the back of it.

Q. State whether or not he looked at both the bill of lading and the draft.

A. To the best of my recollection he looked at them both.

Q. After reading them what did he do with them?

A. He gave them back to me and told me to present them to the bank.

Q. What bank?

A. To the Stock Yards Bank.

Q. What time of day was that?

A. Before 11 o'clock.

Q. On the same day in which the draft was handed to you?

A. Yes, sir.

Q. You went from the National Bank of Commerce over to the Stock Yards building?

A. No; I made other collections as I went.

Q. You got there finally?

A. Yes, sir.

Q. You say it was quite 11 o'clock when you presented it?

A. Yes, sir; about 11 o'clock, I think.

92 Q. When Means & Sons' cashier or book-keeper, the person in charge there, told you to take the draft and bill of lading to the Stock Yards Bank or to leave it there what language did he use to take it there or leave it there?

A. He said leave it in the bank.

Q. What did you do?

A. I made the rest of my collections in the building there and left it there; left it for collection at the bank.

Q. You left it there?

A. At the collection window of the Stock Yards Bank, with the collection clerk.

Q. How long was that after you had presented it at the counter of Means & Sons, to his man in charge, to Mr. Keily?

A. About 15 minutes.

Q. Then what time would you say it was delivered by you to the Stock Yards Bank?

A. About 11 o'clock.

Q. It was left by you at the Stock Yards Bank?

A. Yes, sir.

Q. Look at this draft accompanying the bill of lading and say if it is the same to which you refer in your testimony (showing to witness originals of Exhibits A and B attached to the amended petition).

A. The only thing I can recognize is the stamp on the back here; it has been so long ago I would not know it otherwise.

Q. What is your best impression after looking at it—looking at the amount and the date?

A. I could not say.

Q. Have you any recollection as to the amount of the draft?

A. No, sir; I have no recollection what the amount of the draft was.

93 Q. But the one that day—the draft that you did present—had a bill of lading attached to it?

A. The draft that I presented had a bill of lading attached to it.

Judge STILES: We offer in evidence this bill of lading as Exhibit "C," being Exhibit A to amended petition.

Judge STILES: I suppose we may consider those as read without taking the time to read them?

The COURT: Yes.

Cross-examination by Judge JACKSON:

Q. Do you remember about how many drafts you had with you on that day when you left the bank where you are employed?

A. We only had a few.

Q. Were there bills of lading with most of them?

A. I could not say as to that.

Q. Was it an unusual occurrence to have a draft of the size of this with bill of lading attached to collect at the stock yards?

A. I do not know; no, sir.

Q. Was there anything which occurred at that time to impress upon your mind the fact that this is the same draft that you had at that time?

A. Only that the next day they told me it was protested; that was all that I remember of there being a big draft on Means.

Q. You remember that there was a large draft on Means?

A. Yes, sir.

Q. You do not remember whether there was a bill of lading attached?

A. Yes; I do remember that.

Q. Do you know whether this is the same draft that you had at that time?

A. No; I could not say as to that.

94 Q. Do you know whether this is the bill of lading?

A. No, sir; I could not say.

Q. Do you know in whose favor the draft was that you presented at that time?

A. No, sir; I do not know as to that.

Q. I will ask you whether you had before that presented drafts or bills to Means & Company for collection.

A. Before that time?

Q. Before that time.

A. Yes, sir; I had presented some before that.

Q. Had you presented them to the same gentleman you found there at that time?

A. Yes, sir.

Q. Had he at any time paid them before that?

A. No, sir; he never had.

Q. Had you been advised at any time that there was others to pay—to make payments?

Judge STILES: I object to that as not pertinent to the issue and as immaterial.

By the COURT: I do not suppose that is competent, unless he was informed by the defendants in the case. What somebody else may have said to him would not be competent. Objection sustained, defendants excepting.

Q. In the course of your business with Means & Sons—in the customary course of your business—had you made collections from them personally—had you presented them the drafts?

A. Not that I know of.

Q. I understood you to say in your direct examination that you were instructed by your bank to present the draft or whatever it was to Means & Sons, and if not paid to leave it at the Stock Yards Bank.

A. They were my instructions, but not on that particular draft. No, sir; when I first went to work I was to leave drafts with the Stock Yards Bank for collection.

Q. And under that direction you left the drafts that were not paid at the Stock Yards Bank, did you?

A. Yes, sir.

Redirect examination by Judge STILES:

Q. In reference to this particular draft, you left it under the instruction of Means' book-keeper at the bank, as I understand you?

A. Yes, sir.

Q. I believe you stated he was in charge of the office, and the only one there.

A. Yes, sir.

Q. I want to ask you who accompanied you.

A. Mr. Hickman.

Q. Why did he go with you?

A. He was a new man, and I was showing him.

Q. What was his name?

A. R. Wood Hickman.

Q. You say this draft was protested that day?

A. Yes, sir.

Judge JACKSON: I object to that as hearsay, and except on behalf of defendants.

R. WOOD HICKMAN, a witness called on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination by Judge STILES:

Q. Where do you live, Mr. Hickman?

A. Kansas City, Mo.

Q. What are your initials?

A. R. W.

Q. Were you with Mr. Kingsbury, the last witness on the stand, when he presented this draft at the counter of Means and Sons, in the Stock Exchange building?

A. Yes, sir; I went around with him that morning and saw him present the draft to the person in the office.

Q. Who was this person in charge of the office?

A. I do not know. I do not know him. I had never been down there before. I do not know who it was. I just saw him present the draft. I went in with him.

Q. He presented it at the opening in the window, at the counter, did he?

A. Yes, sir.

Q. About what time was that?

A. It was about 11 o'clock.

Q. What was there, if anything, attached to the draft?

A. I do not know. I did not see the draft. I did not have it in my possession. I do not know anything about it.

Q. What did he do with the paper which was handed him, or papers—what did Mr. Keily, Means & Sons' book-keeper, or the man to whom the draft was presented or handed—what did he do with it?

A. I do not know anything about it.

Q. Did he read it or not—do you know?

A. I do not recollect whether he did that or not. I did
97 not pay much attention to it. All that I was going around that morning for was to learn the route and how I was to collect.

Q. What morning was that?

A. The morning of the 15th of September, 1887.

Q. About what time was it?

A. It was before 11 o'clock; fifteen or twenty minutes, I guess.

Q. Did you see Keily, Means' book-keeper, take the draft in his hand?

A. I do not remember whether he did or not. I do not know whether he did or not.

Q. Don't you know whether Hickman showed it to him?

A. Kingsbury showed it to him. I know he showed it to him. He went up to the window; he was standing there at the window, and he showed it to him there.

Cross-examination by Judge JACKSON:

Q. You say you do not know whether this draft shown here is the same one or not?

A. No, sir; I did not see the draft.

Q. You did not see it?

A. No, sir.

Q. You do not know that the gentleman in Means' office read it or saw it?

A. I know he saw it. I do not know whether he read it or not. I know he said to take it to the Stock Yards Bank.

Q. You do not know whether there was a bill of lading attached?

A. No, sir; I do not.

Mr. CONNELLY, recalled by Judge JACKSON for further cross-
98 examination, testified as follows:

Q. Mr. Connelly, I will ask you to refresh your recollection if anything was said as to the amount of this draft or the member of the firm to whom you were to present it.

A. I do not recollect as to that.

Q. I will ask you if you would have received upon that draft a less amount than it called for.

Judge STILES: I object to that. I do not see how that cuts any figure in this action. I suppose that it is based upon the idea that

we could not recover any more than the cattle were sold for, perhaps.

A. I should not have received anything else than the face of the draft in payment.

By the COURT: Would you have received it and applied it on the draft?

A. No, sir.

Q. Do you know the custom of C. G. Means & Sons as to the payment of drafts—whether any person other than the members of the firm pay drafts presented against the firm?

Judge STILES: I object to that. They cannot regulate their liability by any such custom.

By the COURT: He can answer that.

A. As to the custom, I do not know anything about it, but I do not know that anybody else ever authorized payments of a draft except C. G. Means or C. H. Means. That is simply my present recollection in my business with them.

Q. You do not know what their custom is?

A. Personally that is my experience.

99 Q. You say you would not have accepted anything less than the face of the draft in payment. Did he offer you any less amount?

A. I do not recollect that he did, sir. I might qualify that reply. I would refer that to the National Bank of Commerce by telephone, and if they authorized me to accept a less amount I would do it, but otherwise I would consider myself responsible.

Q. There was nothing of that kind done in this case?

A. No, sir.

R. G. PATTERSON, a witness called on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination by Judge STILES:

Q. Where do you reside?

A. In Jewell county, Kansas.

Q. How long have you lived there?

A. About eighteen years.

Q. What is your business?

A. Stock business.

Q. What was it on the 15th of September, 1887?

A. Stock business.

Q. Are you a farmer? What do you mean by stock business?

A. Raising and feeding cattle.

Q. And selling after you have got them ready and fed?

A. Yes, sir.

Q. You may state what you know about this particular transaction—about this 98 head of cattle, for the purchase of which it is claimed that the Bank of Randall furnished the purchase-money.

100 A. I contracted them with Charlie Lyon, and the Bank of Randall paid for them. I delivered them to the Bank of Randall.

Q. Where were the cattle when you delivered them to the Bank of Randall?

A. They were delivered in the stock yards.

Q. How did the cattle get to the stock yards?

A. I delivered them there, with the help of Charlie Lyon.

Q. You and Charlie Lyon drove the cattle down there, penned them, yarded them?

A. Yes, sir.

Q. Why were they delivered to the bank; for what purpose?

A. Because Mr. Lyon told me he had no money to pay for them.

Judge JACKSON: I object to that as hearsay evidence.

By the COURT: What do you know about it?

A. That was the reason I delivered them to the Bank of Randall, because they were the parties that were to pay me for the cattle.

Q. State whether or not they were delivered to the bank for the purpose of securing the bank.

A. Yes, sir.

Judge JACKSON: I object to that as calling for the conclusion of the witness and not a statement of facts, and except on part of the defendants.

Q. Why were they delivered to the Bank of Randall. What was the object—what was the object and purport?

A. So that they might have them for the purchase-money.

Q. So that the bank could have them for the purchase-money—to secure the bank?

A. Yes, sir.

Q. Do you recollect what the amount was?

A. Why, I was to have $65.00 a head for the cattle.

101 Q. There were how many head?

A. I think 98 head.

Q. State whether or not there was to be a draft drawn by Lyon on Means & Sons for the cattle for the amount that the bank advanced.

A. Yes, sir; there was.

Q. How were they to be delivered in Kansas City?

Judge JACKSON: I object to this mode of interrogating the witness.

Q. What was said, if anything, about as to who the cattle were to be consigned to?

A. They were to be consigned to C. G. Means & Sons.

Q. For what purpose?

A. For the purpose of selling them.

Q. For the purpose of selling them; and what were they to do with the money?

A. They were to return it to the Bank of Randall.

Q. Now, state whether or not a draft was drawn for the amount.

A. I think it was.

Q. By whom was it drawn?

A. By the cashier of the bank, Mr. Bramwell.
Q. He drew it up?
A. Yes, sir.
Q. State whether or not you were present when it was endorsed to the bank and delivered to the bank.
A. I do not know whether I was present at the time.
Q. Who represented the bank; who was the cashier; who represented the bank there?
A. Mr. Bramwell.
Q. What are his initials—do you know?
A. D. D. Bramwell.

102 Q. State whether or not he went to look at the cattle to see whether they would justify him in advancing the amount that was required to pay for them.

Judge JACKSON: I object to that. Let him state what was done.

Q. State whether or not he went to look at the cattle.
A. Yes, sir.
Q. For what purpose?
A. To see if they would be satisfied to furnish the money.
Q. Where did he go to look at them?
A. Down to the stock yards.
Q. Down where they were?
A. Yes, sir.
Q. That is where you were at the time you say they were delivered to the bank, or delivered to him as the representative of the bank?
A. Yes, sir.
Q. What was done with the cattle after this arrangement and this delivery?
A. They were loaded.
Q. In how many cars?
A. Six cars.
Q. Do you know a man by the name of John Guthrie?
A. Yes, sir.
Q. Where does he live?
A. He lives—a neighbor to me—in Jewell county, Grant township.
Q. What arrangement had been made as to his going to Kansas City?

Objected to as hearsay; overruled, defendants excepting.

Q. State whether or not you and he had arranged for him to go to Kansas City with the cattle.
A. Yes, sir.

103 Q. State what Mr. Bramwell said to you in regard to going to Kansas City with the cattle.

Judge JACKSON: I object to that as hearsay.
By the COURT: Go ahead.

Overruled, defendants excepting.

A. He wanted me to go along with the cattle.

Q. Who wanted you to go with the cattle?
A. Mr. Bramwell, the cashier.
Q. For what purpose?
A. To look after the cattle.
Q. Did you go along?
A. Yes, sir.
Q. In what cars were they loaded, of what railroad?
A. The Missouri Pacific.
Q. Do you know anything about why bills of lading were not issued for two of the cars?
A. Because Mr. Guthrie wanted to go along, and they intended to run them all together. They could not pass but two men on the six cars, so they had to bill two cars to Mr. Guthrie in order for him to get a pass.
Q. State whether or not his absence had anything to do with it.
A. Yes, sir; he had to go elsewhere and deliver cattle that morning, and he could not get down any other way.
Q. He was not there at the time the bills of lading were issued for four cars?
A. No, sir; the cattle were all loaded when he got ready to start.
Q. The business was all done?
A. Yes, sir.
Q. These two cars were billed in his name for the purpose of enabling him to pass?
104 A. Yes, sir.
Q. For the reason that only two could pass under a bill of lading for six cars?
A. Yes; without the bills or shipments were separate.
Q. What day of the month was that?
A. I think it was the 13th or 14th of September; one of those days, I believe; that is my recollection.
Q. What time did you get out of the yard on the track to Kansas City?
A. I think about 12 o'clock.
Q. There were three of you—Lyon, yourself, and Guthrie?
A. Yes, sir.
Q. Guthrie had charge of the two cars?
A. Yes, sir.
Q. Were they behind or in front?
A. I could not tell.
Q. What did you do when you got to Kansas City?
A. We went and got some breakfast, I believe, the first thing.
Q. What did you with reference to the cattle or the delivery of the cattle?
A. We delivered them to C. G. Means & Sons.
Q. Were they unloaded from the cars?
A. Yes, sir.
Q. You may state what, if any, conversation you had with Means or heard Lyon have with Means in reference to the purchase of the cattle or what money had been paid for them, or about any draft, if there was any conversation.

A. I believe I told Means that the cattle were paid for, and the Bank of Randall paid me for them, and there was a draft on him.

Q. Where were you when you told him that?

105 A. I was in the stock yards, as nearly as I can recollect.

Q. What was it that you told him?

A. That the Bank of Randall had paid for them and that there was a draft out upon the cattle.

Q. What time of day was it that you made this statement to him?

A. I think it was about noon.

Q. While the cattle were still in his possession in the yards?

A. Probably it was, and probably it was not quite noon, or somewhere near that time, I think.

Q. Were these six cars all delivered together in a bunch?

A. Yes, sir.

Q. And all yarded together in a bunch?

A. I think they were in two different yards.

Q. The two cars were not separated over there?

A. No; I do not think they were.

Q. Part of the cattle put into one yard and part in another, you say, for convenience?

A. Yes; there might have been other yards; I could not say; the cattle were all there, though.

Q. State what, if any, interest Guthrie had in the cattle—this neighbor of yours that wanted to get a pass down and back.

A. He had none that I know of.

Q. All of these 98 head had been bought from you?

A. Yes, sir.

Q. And the Bank of Randall advanced all the money to pay for them, and you delivered all the cattle to them; that was the agreement?

A. Yes, sir.

Q. You have spoken of a conversation you had with Means in which you told him that the Bank of Randall had paid for

106 the cattle and furnished the money. What cattle did you refer to?

A. The cattle that was right there then.

Q. This lot of cattle—this 98 head?

A. Yes; this lot of cattle.

Cross-examination by Judge JACKSON:

Q. What business did you say you were in?

A. Stock business—farming.

Q. Buying and selling stock?

A. Yes; I bought some.

Q. When did you sell these steers to Lyon?

A. I sold them on the——

Judge STILES: Did you hear any conversation between Lyon and Mr. Means in reference to who had furnished the money to buy the cattle?

A. I think I did.

Q. You may state that conversation or the substance of it.

A. I think he said something, or Mr. Lyon told him there was a draft, I think, on the cattle.

Q. A draft in favor of who?

A. Of the Bank of Randall.

Q. Did he state as to who had furnished the money?

A. I believe he did.

Q. Where was that statement—where was that conversation?

A. I think it was in the stock yards. I would not be certain. I think it was in the stock yards.

Cross-examination resumed by Judge JACKSON:

Q. When was it that you sold these steers to Lyon?

107 A. I think it was the day before the cattle was delivered.

Q. Do you know what day that was?

A. I think it was about the 12th of September.

Q. Where were you when you made the deal with Lyon?

A. I was right there in the yard, at home.

Q. At your own house?

A. Yes, sir.

Q. How far from the town of Randall?

A. About ten miles.

Q. Did he pay you any money on them that day?

A. No, sir; not to my recollection.

Q. Do you know whether he did or not?

A. No; he did not.

Q. Did he ever pay you any money on these cattle?

A. No, sir.

Q. Who went with you to the Bank of Randall with the cattle?

A. Mr. Lyon did.

Q. What was he to pay you for the cattle; how much a head?

A. $65.00 a head.

Q. Where were you to deliver them under that agreement?

A. To the Bank of Randall. I was to deliver them to the Missouri Pacific stock yards, in the town of Randall.

Q. What did he say about the shipment of the cattle?

Judge STILES: What did Lyon say? I object to that.

Question withdrawn.

Q. You say you were to deliver them at the stock yards of the Missouri Pacific railroad at Randall?

A. Yes.

Q. When did you deliver them there?

108 A. I delivered them there, I think, on the 13th or 14th; somewheres about that time.

Q. How many did he buy of you on the 12th of September?

A. Why, he was to take a hundred head. I had four hundred and forty head, and he was to take the balance of them if he got along all right with the first lot.

Q. Take all of them?

A. Yes, sir.

Q. Did he not buy of you at that time 143 additional head of cattle besides the 98 head?

A. No, sir.

Q. When were you to deliver the remainder of the 400 head?

A. There was nothing said about that; he was to ship them and see how he would come out.

Q. Was there anything said as to the price he was to pay for the others?

A. He was to pay $65.00 a head.

Q. For the 400 head?

A. 440 head.

Q. That was the agreement made with Charles Lyon before you drove any of them to Randall?

A. Yes, sir.

Q. Do you say that you did not get any money from Lyon before they were delivered at Randall?

A. No, sir.

Q. Did you not get $50.00 at one time?

A. Not that I recollect of.

Q. Will you swear that you did not get $50.00 of him before the cattle were delivered there?

A. If I got any payment from him I have forgotten it.

109 Q. Did you not get another payment of $40.00 before they were delivered?

A. No; I did not get any money off Lyon that I recollect of.

Q. You won't say whether you did or did not get that?

A. That is the best of my recollection, as I have stated.

Q. What time in the day did you get to Randall?

A. I got to Randall about eight or nine o'clock.

Q. In the evening or morning?

A. I think it was in the morning. I think we drove the cattle over there. I don't know but what we drove them during the night; I believe we did.

Q. Did you deliver them in the stock yards at Randall?

A. Yes, sir.

Q. What did Lyon say to you then about paying for the cattle?

A. Why, the arrangement was made for the pay for the cattle before.

Q. How long was it after you put the cattle in the stock yards there before you had any conversation with the bank cashier?

A. I had a conversation with the bank cashier the day before that time.

Q. Did you have any conversation with the bank cashier on the day the stock was delivered at Randall?

A. Yes, sir; I did.

Q. Where did that conversation take place?

A. It took place down at the stock yards and at the bank both.

Q. Where did you have the first conversation?

A. I believe I went up and told the cashier that the cattle was there, and asked him to go down and look at them.

Q. What did he say then?

A. He went right down and looked at them, I believe.
Q. Do you know whether he did or not?
A. He did.
110 Q. What did he say about the cattle and about taking the cattle at that time?
A. He said it was all right.
Q. Said what was all right?
A. He said he would pay for the cattle.
Q. What else did he say about it?
A. I do not know as he said anything.
Q. What did Lyon say to the bank cashier at that time about it?
A. That I could not tell.
Q. Did you hear any conversation between them?
A. I do not recollect that I did.
Q. You don't remember that you did?
A. No, sir.
Q. The bank cashier said that the cattle were all right and that he would pay for them?
A. Yes, sir; he said they were all right and he would pay for them.
Q. Where was Lyon at that time?
A. I could not say; he was around there somewhere, but I do not think he was right so that he heard that.
Q. Was that all that was said by the cashier about that matter or to him in your presence?
A. That is all that I recollect of. He said that he would pay me for the cattle. He said that the cattle were all right, and he would pay for them.
Q. What did you do after that about the cattle?
A. I loaded them.
Q. Had you got your pay for them before you loaded them?
A. He sent it to the bank at Jewell City to my credit.
Q. You got your pay for the cattle before you loaded them?
111 A. Yes, sir; I took his word for it, and he done just as he agreed to.
Q. He agreed that he would remit that amount of money to your credit at the Jewell City Bank?
A. Yes, sir.
Q. Did you have any other conversation with the bank cashier about these cattle on that day?
A. Why, he said he would like to have me go down with the cattle.
Q. What time of day was it—in the same conversation?
A. It was in the forenoon some time; before we loaded the cattle.
Q. Before you loaded the stock?
A. About that time.
Q. Was it at the same time that you went down to the yards to look at the cattle?
A. I could not state just exactly when.
Q. He said he would like to have you go to Kansas City with them. What else did you hear him say about them that day?
A. I do not know as I heard anything else.

Q. Then, if I understand you, all that you know of that was connected with the bank in reference to that matter was that when the stock was delivered at the stock yards you notified the cashier? Is that correct?

A. Yes, sir.

Q. And he looked at the cattle and said they were all right, and wanted you to go to Kansas City. Now, was there anything else?

A. Yes; there was something said about taking a bill of lading on the cattle.

Q. When and where was that said?

A. It was said some time during that forenoon. The understanding was that he was to have a bill of lading on the cattle.

Q. What was said about that?

112 A. I could not tell all that was said. I do not know as I could tell any part of it.

Q. Do you remember anything that was said about a bill of lading?

A. Nothing more than that he was to have a bill of lading on the cattle.

Q. What was said about the matter?

A. I could not say what was said.

Q. Did you hear the cashier say anything about it?

A. Yes; I heard him say that he was to have a bill of lading on the cattle.

Q. Was Lyon present at the time?

A. I guess he was present at the time. They talked about the bill of lading.

Q. What else did you hear said between them about these cattle belonging to the bank?

A. Why, I turned them over to the bank; that is all I know about it.

Q. You turned them over to the bank?

A. Yes, sir.

Q. Where did you do that?

A. Right there in Randall.

Q. What did you say when you did it?

A. I went up to the bank and told them that the cattle was in, and wanted them to go down and look at them and receive the cattle.

Q. Did they go down and look at the cattle and state they were all right and they would pay for them?

A. Yes, sir.

Q. How, then, was it that they stated they wanted to have a bill of lading?

A. That matter was talked with Lyon.

Q. Did you hear him say that?

113 A. I heard them talk about it. I do not know as I could tell what they said.

Q. Do you mean to say or did I understand you to say in your direct examination that these cattle were sold to the bank—delivered to the bank?

A. I said they were contracted to Lyon and delivered to the bank.

Q. You contracted them to Lyon and delivered them to the bank?

A. Yes, sir.

Q. Was there anything said about the bank buying the cattle or receiving the cattle themselves or simply a draft on the cattle?

A. I was to deliver the cattle to the bank at Randall.

Q. Can you tell the jury whether the cattle were in fact to be delivered to the bank or to be delivered to Lyon, and he was to give a draft and bill of lading on the cattle?

A. The cattle was to be delivered to the bank at Randall, and they was to pay for them.

Q. You say you delivered them to the bank. What did you do about it?

A. I drove them down there.

Q. Down to the stock yards?

A. Yes, sir.

Q. What else did you do?

A. I turned them over to the Bank of Randall.

Q. What did you do when you turned them over to the Bank of Randall?

A. The cashier went down there and looked at them—looked at the cattle.

Q. Was that all you did?

A. The bank paid me for them.

Q. Was that all you did with reference to turning the stock over to the Bank of Randall—was it?

A. Yes, sir; I turned the cattle over to the Bank of Randall.

114 Q. Did you sell them to Lyon?

A. Yes, sir.

Q. When did you turn them over to Lyon?

A. I did not turn them over to Lyon at all.

Q. You sold them to him and turned them over to somebody else? Did not Lyon help to select them out in your lot?

A. He helped me to cut them out. The cattle were never turned over to Lyon at all, though.

Q. Did he help you drive them down to the stock yards?

A. Yes, sir.

Q. And that was under the agreement that you had made with Lyon to sell them to him and deliver them at the stock yards, wasn't it?

A. It was in the agreement with him and the Bank of Randall together. I had been to see the Bank of Randall the day before, and was to drive the cattle down there and turn them over to them, and they were to pay me for the cattle. That was the amount of it.

Q. Do you pretend to say that you were selling the cattle to the Bank of Randall?

A. That is all I know about it.

Q. What did the Bank of Randall do with the cattle after the cashier went down there to look at the cattle, and then paid you for them?

A. I helped to load them there.
Q. Who directed you about loading them?
A. I do not know that any one did at all. I was used to loading cattle, and I took hold and helped ship the cattle.
Q. Did Lyon engage the cars?
A. I think he did.
Q. He assisted you in loading them?
A. Yes, sir; we loaded them together.
115 Q. Took the bill of lading in his name?
A. I did not see the bill of lading.
Q. Do you know whether he transacted the business with the railroad agent?
A. That I could not tell.
Q. Did he have charge of the cattle on the train?
A. Why, we had charge of them together; we took care of the cattle to Kansas City together.
Q. Did you have charge of them or did he have charge of them?
A. I considered both of us had charge of them.
Q. When you got to Kansas City what did you do about the cattle?
A. They were unloaded and put in the stock yards.
Q. Where did you first see Mr. Means on the day these cattle arrived at Kansas City?
A. I could not say as to that.
Q. You could not tell where it was?
A. No, sir.
Q. Was it where the train stopped to let the cattle out into the yards?
A. I do not think I saw him there.
Q. Did you have any conversation with Mr. Means, when you first arrived in Kansas City, about the cattle?
A. I do not know as to that. I know we always have considerable talk when I go down there and stop.
Q. I am asking you if you had any talk with him on that occasion.
A. I do not recollect that I had a talk in the stock yards about the cattle.
Q. Then after you got off the train did you have a conversation with him?
116 A. I could not say as to that.
Q. Before you went to breakfast didn't you have a conversation with him?
A. I do not recollect.
Q. Did you hear any conversation between Mr. Lyon and Mr. Means about the cattle that morning?
A. I do not know whether it was in the morning or what time of the day it was, really.
Q. What time in the morning did you arrive there?
A. I think it was probably between nine and ten o'clock; it might have been a little later and may have been a little earlier.
Q. Was it not between eight and nine o'clock?

A. I could not say as to that. Just what time it was I do not recollect.

Q. Did not Means meet you there and take charge of the cattle when you went to breakfast?

A. I do not recollect of seeing Mr. Means there at all when we were unloading the cattle, although he may have been there; I would not say that he was not, but I do not recollect that he was there when we were unloading the cattle.

Q. Let me suggest, to refresh your recollection, if you did not tell Mr. Means, on that morning before you went to breakfast, that there was $50.00 profit to Lyon in these cattle?

A. I could not say.

Q. Did you not say to Means that morning that you would give Lyon $50.00 for his profit in that lot of cattle?

Judge STILES: I object to that as immaterial.

By the COURT: What is your answer?

A. I do not recollect of any such question.

117 Q. You do not remember whether you had any such conversation or not?

A. No, sir.

Q. Now, what conversation did you have with Mr. Means or did Mr. Lyon have with Mr. Means in your presence during that morning about these cattle?

A. Well, sir, I do not know. I do not recollect what the conversation was now.

Q. You do not remember any conversation?

A. I do not recollect of seeing Mr. Means there in the morning at all.

Q. During that forenoon what conversation did you have or hear?

A. Why, I stated that the Bank of Randall had paid me for the cattle and issued a draft on him; that the bank had paid me for the cattle.

Q. Who was present when you made that statement?

A. I think Mr. Lyon was there—present somewhere. I do not know as he heard it. He was somewhere around, and he might have been so that he heard it—heard all that was passed.

Q. Who else was present?

A. I do not know.

Q. What time of the day did that take place?

A. I think it was along about noon.

Q. State what Mr. Means said that called that remark out, that caused you to make that statement.

A. I do not know; I do not recollect. We was talking something about the price of cattle, I think, and I thought they were not getting enough for the cattle.

Q. That who was not getting enough?

A. Mr. Means.

Q. Had he sold the cattle?

A. No; they were not sold then, but I think he was pricing them.

118 Q. What did you say to him about the matter when he was pricing them?

A. I told him that I thought the cattle ought to sell for more money, to the best of my recollection.

Q. What else did you tell him?

A. I do not recollect telling him anything except that the Bank of Randall had paid for the cattle and issued a draft on him.

Q. Was that at the same time that you told him the cattle ought to sell for more money?

A. About that time; right there in the yard.

Q. You say that was the substance of your statement to him about the Bank of Randall, do you?

A. Yes, sir.

Q. And that was called out by his pricing the cattle, and you said they ought to sell for more money?

A. I do not know exactly what we were talking about altogether, but I know that was said.

Q. Have you talked with Mr. Lyon or the officers of the Bank of Randall about it since then?

A. Yes; he has talked with me about it.

Q. How many times?

A. I could not tell how many times; not very many times.

Q. Have you talked with every officer of the Bank of Randall, either yesterday or to-day, about that matter?

A. Yes; I have been talking with them some.

Q. Was it the cashier of the bank that you were talking with?

A. Yes, sir.

Q. Talking with him yesterday?

A. No, sir; to-day. They were asking me some questions.

Q. They were asking you some questions about it?

A. Yes, sir.

119 Q. Did they ask you if you did not tell Means at that time that a draft was drawn on these cattle?

Judge STILES: I object to that as not proper examination.

By the COURT: Go ahead.

A. Believe they did.

Q. How many times?

A. I told them that there was a draft drawn on the cattle.

Q. And they asked you that question this morning or to-day some time?

A. I think they did.

Q. Did they ask you this same question before you came down here from Jewell county?

A. I do not know whether they did or not. I do not know but what they did, and I do not know as they did. I would not be positive.

Q. Have you not had several conversations with the banker, cashier, or president of the Randall Bank about this matter?

A. No; not a great many.

Judge STILES: They have been all over that ground once, and I object to it as an immaterial matter, anyway.

Redirect examination by Judge STILES:

Q. You say that Lyon contracted for the cattle and the bank paid for them, and they were to be delivered to the bank?

A. Yes, sir.

Q. To whom did it pay—for whose benefit?

A. For my benefit.

Q. The money did not go into the hands of Lyon at all?

A. No, sir.

Q. When was it paid to you?

120 A. It was paid to me on the 12th or 13th, or thereabouts. I think we drove the cattle over on the 13th or the night of the 12th, whatever day it was. I am not positive, because I do not recollect now.

Q. How was it paid; how did the bank pay you?

A. Well, it was sent to the bank in Jewell City to my credit.

Q. The price of the cattle, 98 head, $65.00 a head?

A. I could not tell just the amount that was sent.

Q. Not just the amount, but that was the rate?

A. Yes, sir; the cashier of the bank agreed to send it there, and when I got back my bank had got the credit just according to contract.

Adjourned until to-morrow morning at 9 o'clock.

THURSDAY, *December 27th*, 1888—9 o'clock a. m.

Court met pursuant to adjournment.

Same case continued as on yesterday.

R. G. PATTERSON on the stand.

Redirect examination resumed by Judge STILES:

Q. You say that you were requested by the bank to go down with the cattle, to look after their interest, or its interest?

A. Yes, sir.

Q. I want to know how this conversation between you and Means came up when you notified him about the draft, if you are able to recollect the connection it had, what gave rise to it.

A. We was talking about the price of the cattle, and I told him I thought the price of the cattle was too low; that they would not pay out, hardly.

Q. Would not pay the draft?

121 A. Yes, sir.

Q. What do you mean by pricing them? The price that he put on them?

A. Yes, sir; the price that he put on them. I thought the cattle were worth more money.

Q. That was what gave rise to the conversation that you stated yesterday. What did you mean by paying out?

A. Paying the purchase-money.

Recross-examination by Judge JACKSON:

Q. Did you tell him what the purchase-money was—how much?
A. I do not just recollect. I think I did.
Q. Do you have any recollection about it?
A. I think I did.
Q. Did he tell you what he sold the stock for?
A. I knew what he had priced them at.
Q. Did he tell you?
A. Yes, sir.
Q. Did you tell him how much was drawn against the cattle?
A. I think I did.
Q. Do you know whether you did or not?
A. To the best of my recollection, I did.
Q. You have a distinct recollection about what you said?
A. Yes; I think I told him that the cattle were to be $65.00 a head.
Q. Was that what you said?
A. I think I said about that.
Q. Did you say anything about how much the draft was for?
A. No, sir; I did not.
Q. Did not say anything about that?
A. I told him there was a draft on the cattle—a draft out
122 against the cattle.
Q. You say you told him, or you think you told him, that the price paid was $65.00 a head?
A. Yes, sir.
Q. Mr. Patterson, do you remember Mr. Means stepping to one side and talking to you privately about these cattle at that time?
A. No, sir.
Q. You do not?
(No answer.)
Q. Do you remember having a conversation with Mr. Means at his office about it in the presence of Mr. Wells?
A. No, sir; I do not recollect of having any.
Q. Were you present at the conversation between Mr. Means and Mr. Lyon on that day as to the price of the cattle?
A. I do not believe I was.
Q. Do not think you were?
A. No, sir.
Q. Did not you state to Mr. Means on that day, with reference to the price of these cattle, in answer to the question by Mr. Means as to what Lyon paid you for them, that that was a private matter between you and Lyon; that if Lyon was amind to tell him it was all right, but you would not, or words to that effect?
A. I do not recollect anything of that kind.
Q. I am asking you if you were not present when Mr. Means asked Mr. Lyon what he was to pay you for the cattle, and Lyon said that that was a private matter between you and him, and he would not tell it.
A. I do not recollect any such conversation.

Q. How much was the draft for, did you say?

A. I could not tell exactly. I did not see the draft that I know of.

123 Q. Did not hear anything said about it as to the amount?

A. No, sir.

Q. Do you know how much was placed to your credit by the bank on account of it?

A. Not exactly.

Q. Do you know about how much there was against the cattle?

A. Why, I know the price of the cattle. I do not know just the amount that was placed to my credit at my bank. In fact, I do not know as I looked it up after I went back.

Q. Don't you know that that draft was for $6,700.00?

A. No, sir; but whatever it was it was paid just according to agreement.

Q. You say the price you were to receive for the cattle was $65.00 a head?

A. Yes, sir.

Q. That amounted to $6,370.00. Can you state whether there was that amount placed to your credit?

A. No, sir; I do not know.

Q. Do you not know, as a matter of fact, that there was over $300.00 of that draft—$300.00 and over—that applied upon the purchase of other cattle by Lyon?

A. No; I do not, because I never figured up what the cattle came to.

Q. Don't you know that that $300.00 was applied upon another purchase of cattle that you and Lyon shipped to Chicago afterwards?

A. No; I do not know as to that.

By the COURT: This cross-examination is taking too wide a scope and will have to be concluded. Call your next witness, gentlemen.

124 C. S. LYON, a witness called on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination by Judge STILES:

Q. Where do you live?

A. I live in Jewell county.

Q. Are you the same Lyon that has been referred to in the testimony?

A. Yes, sir.

Q. Who contracted for the purchase of the cattle from Patterson?

A. Yes, sir.

Q. How many head of cattle did you contract for with Patterson at that time?

A. I think 246; maybe one or two less or one or two more.

Q. You may state, in your own way, the facts in reference to the contract—what arrangement you had with Patterson.

A. Well, sir, I bought the cattle on the 13th, providing I could

pay for the cattle. Mr. Patterson and I then went in a buggy down to the Bank of Randall, in the town of Randall.

Q. For what purpose?

A. To see if I could get the money to pay for the cattle. We went in and seen Mr. Bramwell, the cashier, and he wanted to know in what way I wanted the money. I said, The usual way. He said, "All right; fetch on your cattle."

Q. When did you bring in this 98 head in question in this case?

A. They were drove in on the 14th, sir. Mr. Patterson and I both drove them in together.

Q. You had no money to pay for them yet?

A. No, sir.

125 Q. Where were they placed when you brought them into Randall?

A. In the stock yards.

Q. What did you do further with Mr. Bramwell?

A. I went and billed out four cars of that stock.

Q. Where did you see Mr. Bramwell after you got the cattle yarded? Did you go to the bank?

A. Yes; I went right up to the bank.

Q. State whether or not Bramwell and Patterson went down with you to look at the cattle.

A. Yes; they went down to look at the cattle. I did not hear that conversation. I went off to fix up some cars across on the road, and I was there at the time of that conversation.

Q. State whether or not the bank furnished you with all the purchase-money to pay for that 98 head of cattle.

A. They did.

Q. State now what the agreement was, if there was any, in reference to the bank holding the cattle as security.

Judge JACKSON: We object to this method.

Q. State what was said or the substance of what was said, if anything, in reference to the bank being secured by the cattle.

A. That was all that was said between Bramwell and I. The day before—the 13th—the 13th was the day we, Patterson and I, went down there, and I went into the bank and seen Mr. Bramwell. He asked in what way I wanted to get this money, and I told him in the usual way; that I had been shipping from there before.

Q. State, when you made the draft on Means & Company for the money that had been paid by the bank for the cattle, if you did make such a draft.

A. On the 14th of September.

126 Q. Do you recollect the amount of the draft?

A. Yes, sir.

Q. What was its amount?

A. $6,700.00.

Q. When was the draft made?

A. On the 14th of September.

Q. What was it for?

A. It was in payment for these cattle.

Q. You drew against what was equally known as — you drew against the cattle, did you?

Objected to as leading and not calling for the testimony of the witness.

Q. What did you draw on Means & Company for?
A. $6,700.00.
Q. For what purpose was the draft drawn?
A. To pay for these cattle.
Q. Who did you agree upon between you that the cattle should be shipped to, if any one?

Judge JACKSON: I object to that as leading and not proper examination.

By the COURT: Let him state what the conversation was.

Q. State if any one was agreed upon who the cattle should be consigned to between you.
A. There was nothing said as to who we should ship the cattle to until I made the draft.
Q. What was said then?
A. Then I drew up the draft on C. G. Means.
Q. Means & Company were to be the consignees?
A. Yes, sir.
127 Q. Did you have any money to pay for the cattle yourself?
A. No, sir.
Q. What did you do with the draft after it was drawn?
A. I gave it to Mr. Bramwell.
Q. State whether or not you endorsed it.
A. Yes, sir.
Q. State whether or not you gave anything to him.
A. Yes, sir; I went down—yes, sir; a bill of lading.
Q. You say you went down. What? Go on.
A. I went down to the depot and brought the bill of lading and gave it to him.
Q. What time was that?
A. That was on the 14th.
Q. Was it at that time or an hour afterwards?
A. The same day and the same time.
Q. Did you have the bill of lading with you when you got the draft?
A. Yes, sir.
Q. What, if anything, was said about the bill of lading not covering all of the cattle when you brought it there to the bank, if anything was said?
A. Mr. Guthrie, a neighbor there, wanted to go down. That was the reason there was not a bill of lading on the other two cars.
Q. Explain to the jury, if you can.
A. Mr. Guthrie had gone to Jewell City and was coming down to the train to take our stock out on the 14th, and there was not time for him to get a bill of lading and get out with the stock.

Q. You supposed in his absence a bill of lading could not be made to him? Was that it?

A. Well, he was not down, at any rate.

128 Q. And the object was to afford him a pass, did you say?

A. Yes, sir.

Q. Under what rules or customs of the company?

A. Why, two persons with four or five cars, and we could not pass three men down on five cars. We expected to have only five cars, but they brought us such small cars that we could not get the cattle all into five cars, and we had to take six cars.

Q. In whose name were the two cars shipped that were not covered by the bill of lading?

A. Mr. Guthrie's.

Q. For the purpose you have stated—to get him a pass?

A. Yes, sir.

Q. Do you know how many cattle there was in the four cars?

A. I do not. I forget how many there was.

Q. How many were there in the two cars?

A. I could not tell you.

Q. After you got to Kansas City what did you do with the cattle?

A. The stock yards men unloaded them.

Q. Did you endorse this bill of lading, too, when you endorsed the draft?

A. Yes, sir.

Q. Delivered them both to the bank?

A. Yes, sir.

Q. Explained why the bill did not cover the other two cars? Explained why the other two cars were not billed; why the bill did not cover the other two cars?

A. Yes, sir.

Q. What was done when you got to the Kansas City Stock Yards?

A. The cattle was unloaded.

129 Q. Just go on now and state all that took place there.

A. The cattle was unloaded and put in the pens, and Patterson and I went and got some breakfast.

Q. Who was there when the cattle were unloaded?

A. A good many were there.

Q. Whose pens were they? Did they belong to the stock yards?

A. Yes, sir.

Q. Did not belong to Means & Sons?

A. I think not.

Q. Was Means & Sons there at the time?

A. I did not see anybody but Means.

Q. What, if any, conversation did you have with Means in reference to the purchase-money of the cattle, by whom it had been furnished or the drawing of the draft, or anything about it?

A. We had a little conversation there, when the cattle first got in, in reference to the cattle; we were all looking at the cattle; called them nice cattle. Mr. Means asked me what I paid for them, and I did not tell him.

Q. You did not tell him?

A. No, sir.

Q. What, if anything, was said by you in reference to who had furnished the money to buy the cattle?

A. Mr. Means and Mr. Patterson was having a little conversation there about the cattle, but I do not remember what they did say.

Q. What did you say?

A. I said there was a draft on the cattle.

Q. You told that to Means?

A. Yes, sir.

Q. For what?

130 A. Now, the amount I don't know whether I stated.

Q. What did you tell him that was for—for the purchase-money or what?

A. I told him it was on these cattle.

Q. By whom did you tell him the bank draft was given?

A. I told him that I had shipped the cattle from Randall.

Q. Who did you tell him, if any one, had furnished the money?

A. That the Bank of Randall had.

Q. Now, give your language as near as you can in reference to that, so that the jury may thoroughly understand it—about the draft being made and who had furnished the money—I mean the substance of it, as near as you can recollect.

A. Mr. Patterson and I and Mr. Means was talking there about the cattle, and I believe Mr. Means asked Mr. Patterson if he had got his money for the cattle—I think that is all you are asking me—and Patterson said he had. Means asked Mr. Patterson what I had paid for the cattle, and, as near as I recollect, Patterson told him it was none of his business.

Q. You have got to the point to which I was calling your attention. What was said, now, between you and Mr. Means about what you had paid for these cattle? I want to have you state that.

A. I told him there was a draft on the cattle.

Q. By whom did you tell him the draft had been given?

By the COURT: He has already gone over that once.

Q. Did you mention the amount of the draft?

A. I won't be positive about that.

Q. But you told him to whom it had been given and for what purpose?

A. Yes, sir.

Q. This conversation was all before the cattle were sold,

131 when you first came in there?

A. Yes, sir.

Cross-examination by Judge JACKSON:

Q. What time of day was the draft drawn?

A. Somewheres near noon, I think.

Q. Was that before or after the cattle were ready?

A. It was before.

Q. Before the cattle were loaded?

A. Yes, sir.

Q. How long after that was it before you got the bill of lading on the cattle?

A. I got the bill of lading on the cattle before I loaded them. I think I did.

Q. Are you sure whether the agent of the company gave you a bill of lading before you had any cattle in the cars?

A. It seems to me now that the train was late that day. I won't be positive now about this matter—whether I got the bill of lading before or not—but I think the train was an hour or two late.

Q. You do not know whether you had the bill of lading at the time you drew the draft or not?

A. I won't be positive whether it was before or afterwards.

Q. You say you do remember the amount of the draft. That draft was not altogether for this lot of stock, was it?

A. No, sir.

Q. It was for some other stock as well?

(No answer.)

Q. Who was present at the conversation you had with Means in Kansas City on that morning?

132 A. Mr. Patterson.

Q. Any one else?

A. Mr. Guthrie was around there occasionally, but I do not think he heard this conversation. I won't be positive about that.

Q. What induced this conversation?

A. I do not recollect what brought it up.

Q. Can you just state the conversation in the way it occurred, so as to present this matter and the substance of that conversation fairly to the jury?

A. It started, in the first place—Mr. Means and Mr. Patterson were having a conversation. They were guessing on a steer jokingly together. Mr. Patterson was guessing on his weight, and so was Mr. Means. Then they were talking there together about cattle, and by and by he said, "What did you pay for these cattle?" I did not tell him. Then he turned around and asked Mr. Patterson, and Patterson said it was none of his business; said he, "If Charlie (that meant me) is a mind to tell you it is all right."

Q. Is that all that was said?

A. Then I told Mr. Means, in some way or other, that there was a draft on these cattle.

Q. How many conversations did you have with Means on that day?

A. Why, we were talking in the morning, and along in the afternoon we run together two or three times.

Q. What time in the afternoon did you talk with him?

A. It was about four o'clock—I think it was.

Q. Where was that conversation?

A. That was up at the exchange, right on the State line.

Q. What was said about the draft in that conversation?

133 A. There was nothing said in that conversation about the draft.

Q. Have you stated all that was said to Means about the draft?

A. About what?

Q. Have you stated all that was said to Means about the draft on that occasion?

A. Well, all that I recollect of now.

Q. What was said by any of you, either yourself or Patterson, about your paying $65.00 a head for the cattle?

A. Do you mean when we were in Kansas City?

Q. Yes; at that conversation.

A. What did Patterson say to me, you mean?

Q. What did either yourself or Mr. Patterson say to Mr. Means about your having paid Patterson $65.00 a head for the cattle?

Judge STILES: When he was present?

Judge JACKSON: Yes; certainly.

A. I do not recollect any conversation of that character at that time. There was something said.

Q. There was something said?

A. Yes, sir.

Q. By whom was it said?

A. Mr. Means and Mr. Patterson was talking, but I could not recollect what was said.

Q. Was there anything said about the price per head?

A. Yes, sir.

Q. You stated just a moment ago that Patterson said that was none of his business.

A. Yes, sir.

Q. That if you were a mind to tell, that was all right?

134 A. Yes, sir; Mr. Patterson did not tell him nor I did not tell him. Mr. Means wanted to know what they brought per head, but there didn't either of us tell him that day. I know I did not tell him.

135 DAN. D. BRAMWELL, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct examination by Judge STILES:

Q. Where do you reside, and what is your occupation?

A. I reside in Randall, Kansas. I am cashier of the Bank of Randall.

Q. How long have you been in that business?

A. Ever since the bank has been established—since June, 1887.

Q. When was the bank established?

A. Established in June, 1887.

Q. Incorporated as a bank under the laws of Kansas?

A. Yes, sir.

Q. It has been doing business as a bank—a general banking business?

A. Yes, sir.

Q. Since that time?

A. Yes, sir.

Judge STILES: We offer, in connection with this witness's testimony at this point, a certified copy of the charter of this bank.

Judge JACKSON: I suppose that is properly certified, as a matter of course?

Mr. SMITH: Just consider it read.

Judge JACKSON: Very well.

Judge STILES: And also a certified copy of the organization filed with the recorder and certified to by the recorder of Jewell county.

136 Papers in question marked Exhibits D, E, and F, which were proper in form and proved the incorporation and organization of the bank.

Q. You say the bank has been acting as a banking corporation and doing a general banking business since June, 1887?

A. Yes, sir.

Judge STILES: I ask these questions because they have a plea of *ultra vires* in this defense here.

Q. How long did you say you had been its cashier?

A. Ever since its organization.

Q. You may state now what you know about the transaction in question; state what was said and done about it.

A. On the 13th or 14th day of September Mr. Lyons and Patterson came to the bank—that is, drove up in front of the bank—and Mr. Lyons came in and said he had bought some cattle of Patterson and wanted to ship 100 head the next day—wanted to know if he could make arrangements with us for the payment of the cattle. I asked him how he was going to ship; he said in his usual way. His usual way was to give us security upon the stock and give us the bill of lading. I won't be sure whether I asked him how much money he would want to use or not. I told him all right, if the cattle proved satisfactory to bring them on and I would let him have the money.

Q. You told him you would let him have the money if the cattle proved satisfactory?

A. Yes; I believe that was all that was said between Lyons and I that day. Mr. Patterson came in before they went out, before he went home, and asked me if Lyons had made the arrangements to ship them cattle next day. I told him he had, and I told him
137 the circumstances, and I think that was all the conversation that Patterson and I had about it; I think that was about all. In talking about the sale of the cattle I won't be sure whether I asked him the price or not. It seems to me that I did. I won't be sure whether he stated the price or not. I won't be positive about that. I think that was about all the conversation we had on that day.

Q. That was the day before the cattle came in?

A. Yes, sir.

Q. You may state what took place, as well as you can, on the next day.

A. On the next day Lyons and Patterson brought the cattle up,

and they both came into the bank together and sat down and talked a few minutes about various topics; I presume not about the cattle, exactly. I said, Have your cattle come in? They said, Yes. Said I, "Well, I will go down and look at them."

Q. You would go down and look at them for what purpose?

A. To see if I would be satisfied and if I would advance them the money, and I went to the yard, and Patterson and I went down to the yards and sat on the stock-yard fence and looked at the cattle. I think Lyons was fixing up the cars, getting ready for shipment. I asked Patterson if he thought the cattle would pay out——

Judge JACKSON: We do not think that is competent evidence.

By the COURT: A conversation with Patterson as to what his judgment was would be hardly competent. Go on.

Q. What conversation, if any, did you have as to what the arrangement was, or agreement was, or the contract was?

Overruled to the extent indicated, defendants excepting.

A. You mean state what that conversation was that took place between me and Mr. Lyons or me and Mr. Patterson?

Q. Not in reference to the value of the cattle, but anything
138 that will explain the transaction further.

A. I looked the cattle over, and we, of course, talked the matter over, and I told Patterson that I believed the cattle would pay out.

Objected to as incompetent; overruled, defendants excepting.

By the COURT: Did you finally accept the cattle as sufficient for the draft?

A. I did. I accepted the cattle as sufficient security for the money we would have to advance.

Q. To whom were the cattle to be delivered?

A. They were to be shipped to Means & Sons, to Kansas City.

Q. To whom were they to be delivered there at the yards?

A. They were to be delivered to us as security.

Q. Before the cattle were paid for in whose possession were they? Who was the owner of the cattle? Who was in possession of the cattle before they were paid for?

A. I understood that Mr. Patterson was.

Q. To whom were they delivered by Patterson?

A. Do you mean—they were delivered to the railroad company—that is, they were delivered at the yards.

Q. You said awhile ago they were delivered "to us." Who did you mean by "us?"

A. They were turned over to us as security for the payment of the money; that was my understanding about it; for the payment of the draft—payment of the money, I should say, for the cattle.

Q. Upon the strength of that did you make the necessary advance to pay for the cattle?

Objected to as leading and continually calling for the conclusion of the witness.

Q. What did you do in the way of advancing the money
139 for the purchase of the cattle?

A. I agreed to pay the money for the purchase of the cattle on condition that they were to be holden to us for the amount, and that we were to have a bill of lading upon the cattle, but they were, of course, to be drawn on for the amount of money advanced.

Q. You may state what further was done in the way of carrying out the arrangement.

A. I went back to the bank, and in a little while Mr. Lyons came up and made the draft on Mr. Means & Sons for $6,700. $6,500 was to be paid to Patterson, and I don't know—I think he brought the bill of lading afterwards. I don't think he had it with him at the time he made the draft, but I won't be positive about that.

Q. What conversation did you have with him about the bill of lading—why it didn't cover the other cars. What conversation did you have with them about that, if any?

A. I asked him why the bill of lading did not cover the six cars, and he explained to me that in order to get a pass for Guthrie it would be necessary to have the cars billed in his name. He said, When they arrive at the yard they will be turned over and be sold in payment of your draft. He asked me if that was satisfactory, and I told him it would be if they was so applied.

Q. State whether or not now the draft was endorsed by Lyons after it was drawn at the time.

A. It was endorsed by Mr. Lyons.

Q. Was the bill of lading endorsed at the time?

A. The bill of lading was endorsed at the bank—yes, sir.

Q. You may examine that draft and that bill of lading and state whether they are the ones to which you have been referring
140 (papers shown witness)—the same draft and the same bill of lading that have already been introduced in evidence.

A. Yes, sir.

Q. Was Mr. Lyons' name on the draft?

A. Yes, sir.

Q. And his endorsement on the bill of lading?

A. Yes, sir.

Q. What did you do with that draft and bill of lading in the way of collecting it?

A. I forwarded it to the National Bank of Commerce of Kansas City, with instruction to collect it and protest if not paid.

Q. State whether it was paid or protested.

A. It was protested—returned to me protested by Mr. Connolly.

Q. Has it ever been paid?

A. No, sir.

Q. Has any portion of the money that you advanced under the arrangement which you stated ever been paid to the bank or for the bank?

A. No, sir.

Q. What, if any, arrangement did you make with Patterson about going with the cattle?

A. I asked him if he would see after the cattle and see that the

draft was paid. I told him it was a large consignment and I wanted some one to go and look after it, and he said he would.

Q. Do you know whether he went?

A. I presume he went; I didn't see him get on the train.

Q. You say it was agreed that Patterson should deliver the cattle to you, and they were delivered as security?

A. Yes, sir.

Q. To whom did you pay this money?

A. I paid the money to Mr. Patterson, or by his order. I
141 sent it to the bank at Jewell City.

Q. How was it sent? To whom was it paid? You may explain to the jury.

A. I drew a bill of exchange and remitted it through the mails to Mr. Moseley.

Q. Who is Mr. Moseley?

A. He is the banker at Jewell City. I drew it in accordance with his direction.

Q. Was that in accordance with his directions?

A. Yes, sir.

Q. That was the way you paid for the cattle?

A. Yes, sir.

Q. What was the amount of the draft?

A. $6,700.

Q. What did it cover? What did it show?

A. It was supposed to cover one hundred head of cattle. I supposed there was a hundred head of cattle to be shipped. That was the statement, as I understood it, and the draft was made for $6,700, and I was directed to pay $6,500 to Mr. Mosley for Mr. Patterson. The difference between $100 and the exchange on the draft I paid to Mr. Lyons.

Q. For what purpose?

A. For his expenses.

Q. That leaves another $100, does it not?

A. I paid that to Mr. Lyons.

Q. When?

A. The day before.

Q. How did you come to pay that?

A. Mr. Lyons said he would like to have a hundred dollars.

Q. He said he needed it?

A. Well, I don't know. He said he wanted it, and I let
142 him have it.

Q. That made the amount of the draft which you supposed was for the hundred cattle?

A. Yes, sir; there was supposed to be a hundred cattle.

Q. Do you know how many cattle were in the two cars?

A. No; I do not.

Cross-examination by Judge JACKSON:

Q. Mr. Bramwell, what was said between Mr. Lyons, Mr. Patterson, and yourself on the 13th of Sept., the first conversation you had about this subject?

A. Mr. Lyons and I had the conversation alone.
Q. Very well; state that.
A. He came into the bank and said he had bought some cattle—did not say how many cattle, but said he had bought some cattle—of Mr. Lyons and wanted to ship one hundred head next day if he could make some arrangements to pay for the cattle. I asked him how he was going to ship. He said in his usual way. His usual way was——
Q. Wait now. I ask you now to state just what was said.
A. I asked him how he was going to ship. He said in his usual way.
Q. What else was said in that conversation about that matter.
A. I told him all right.
Q. Was that all?
A. I don't remember that there was anything else said.
Q. Was Mr. Patterson present at that interview?
A. No, sir.
Q. That was between yourself and Mr. Lyons?
A. Yes, sir.
Q. You were to furnish the money to Lyons, were you?
A. I was to furnish Lyons money for the cattle.
143 Q. Lyons applied to you for the money, didn't he?
A. Lyons said he was going to ship if he could get the money.
Q. Get the money from you to pay for the cattle. Was that it?
A. Well, he said he was going to ship the hundred head and wanted to know if he could make arrangements with me to pay for the cattle. Yes, sir; that was about it.
Q. Then the transaction on that day was all with Lyons, was it not?
A. Yes, sir.
Q. On the same day you let him have the $100.
A. Yes, sir; on the same day.
Q. That did not go to Patterson, did it?
A. No, sir.
Q. There was nothing said in that conversation about paying Patterson?
A. Not that I remember of.
Q. On the next day he came to the bank and spoke about that?
A. They both came in.
Q. What was said?
A. I asked them if the cattle were in, and Lyons said they were. I said we would go down and look at them, and we did.
Q. What was said between you and Lyons?
A. I don't think there was very much said. Mr. Patterson and I did most of the talking. Mr. Lyons was over fixing the cars, I think, at that time.
Q. Did you afterwards see Mr. Lyons again at the bank?
A. Yes, sir.
Q. What time in the day was that?
A. Some time in the afternoon, I think. I would not be positive.

Q. What was said between him and yourself at that time?
144 A. He came then to take his draft on the cattle.
Q. What was said by him to you?
A. I do not know that I could repeat exactly what was said.
Q. State the substance of it.
A. He just simply said he wanted to make a draft on the cattle.
Q. Was that all?
A. I think that was about all.
Q. You wrote out the draft and he signed it?
A. Yes, sir.
Q. How long after that was it he came with the bill of lading?
A. I would not be positive just how long, but it appears to me that he brought the bill of lading after he signed the draft.
Q. What did he say when he brought the bill of lading?
A. He said, "Here is your bill of lading."
Q. That is where the conversation ended at that time?
A. He said, "Here is your bill of lading." I went up to the bank window and looked at it and asked him why it did not cover the six cars of cattle. He said Guthrie wished to produce a pass to Kansas City and billed two cars to him for that purpose. I asked him if that was all the purpose. He said it was. He said the cars would be turned over when they got to Kansas City in payment of this draft. I told him if that was all that it was all right. I knew Mr. Guthrie and did not fear that part of the contract.
Q. What else was said about it?
A. I do not remember anything.
Q. Then up to this time there was nothing said about your buying the cattle or paying Patterson for the cattle, was there?
A. No; I don't think there was. I don't think that Mr. Guthrie—Mr. Lyons, I should say—mentioned it.
145 Q. You do not think Mr. Lyons mentioned it?
A. I do not think he did.
Q. Did you have any further conversation with Mr. Lyons about the cattle?
A. In any direction do you mean?
Q. In any direction. I am asking you now for a full statement of the transaction that occurred between yourself and Mr. Lyons.
A. I could not remember. We probably had more or less conversation, but I do not know as I can remember it now.
Q. Have you stated the substance of that contract made with Mr. Lyons, so far as you can recall it?
A. Yes, sir.
Q. You say that you have never received any part of the money due on this draft?
A. No, sir; I never have.
Q. Has any part of it been paid to you?
A. No, sir.
Q. Any part of it been satisfied?
A. No, sir.
Q. Did not Mr. Lyons convey you a tract of land afterwards in satisfaction of part of this draft?

A. No, sir.

Q. Did not your bank receive a conveyance of a tract of land to apply on this draft?

A. He gave the bank a mortgage on the tract of land.

Q. To secure a part of this draft?

A. I do not know. I do not remember. I do not know as I could tell what the mortgage covered.

Q. Can you tell what kind of mortgage?

By Judge STYLES: I object to that as immaterial.

146 By the COURT: We will not go into that question.

Judge STYLES: If the court does not desire to admit any further testimony on this subject we desire to have stricken out what has been given.

By the COURT: It will be stricken out; it is not material.

Defendants excepting.

By the COURT: The question is whether the bank got a lien or a pledge on these cattle for their debt—a prior lien or claim. This transaction has to stand upon the transaction made at that time. Any subsequent lien would not change it. If Lyons afterwards gave the bank a mortgage as additional security it cuts no figure here. If the bank had been paid any part of its debt they could recover the balance, but there is no evidence of any payment.

Q. You have stated now, Mr. Bramwell, all the conversation that you had with Mr. Lyons with reference to this transaction?

A. I think I have.

Q. And those conversations constitute the only contract or arrangements you had with Mr. Lyons about it?

A. I believe it is.

Redirect examination by Judge STYLES:

Q. I want to ask you—you said there was some statement made that the said shipment was to be made as usual. I want to ask you if the Bank of Randall had any similar transaction with Mr. Lyons in the course of which bills of lading and drafts had been drawn.

A. Yes, sir.

Q. And, if so, by whom had they been drawn, and upon whom?

A. They had been drawn by Mr. Lyons and upon Mr. Means & Sons.

Q. Do you recollect how long before the last transaction?

A. I think about a week or ten days, or possibly a little longer. I would not say positively as to the date.

147 Q. State whether or not you had advanced the money in the prior transactions and upon drafts as you did in this case.

A. Yes, sir.

Q. Drawn on Means & Sons by Lyons and turned over to you?

A. Yes, sir.

Q. Had those drafts been paid by Means & Sons?

A. Yes, sir; they had; they had been paid. I presume they had been paid by them.

Q. To what bank did you forward them for collection?
A. To the National Bank of Commerce, Kansas City.
Q. That was a week before?
A. A short time before; I would not say just how long.
Q. Do you know whether it was one or two car-loads; how many car-loads?
A. The amount was about $3,500; something like $3,500. I do not know as I ever knew just how many cars there were.
Q. That was for cattle also, was it?
A. I think for cattle and hogs.

JOHN GUTHRIE, a witness called and sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Judge STYLES:

Q. Where do you live, Mr. Guthrie?
A. Jewell county, Kansas.
Q. Are you the same Guthrie that has been referred to?
A. Yes, sir.
Q. As going with the two car-loads of cattle?
A. Yes, sir.
Q. Involved in this case?
A. Yes, sir.
148 Q. State whether or not you did go with those two car-loads.
A. I did.
Q. Were the whole six car-loads in one train?
A. Yes, sir.
Q. What interest, if any, did you have in the cattle?
A. I had no interest whatever except as to getting a pass. I was going there to buy some starters, and they gave me a pass on the cattle.
Q. They were billed in your name for the purpose only of getting a pass?

Objected to as leading.

By the COURT: If you want to testify we will put you on the stand.

Q. State what, if any, conversation you had with—that is all.

EUGENE RUST, a witness called and sworn under affidavit, testified as follows:

Direct examination by Judge STYLES:

Q. Is there any question here about when the cattle arrived in the yard?
Mr. MEANS (from his seat): About 9 o'clock, I suppose.
Q. Where do you reside and what is your business?
A. Kansas City; ass't sup't of the Kansas City Stock Yards Co.
Q. Were you occupying such a position at the time of the receipt of the cattle in question?

A. Yes, sir.

Q. Do you know at what time they were received at the stock-yards?

A. Only what our records show.

Q. You keep the records for the purpose of showing the date of arrival, etc.?

149 A. Yes, sir.

Q. Speaking from the best knowledge you have on the subject and from consultation of your record in which these things are recorded, what time did you say the cattle arrived there?

A. About 9 o'clock is my recollection.

Q. On what day of the month?

A. I think it was the 15th of Sept.

Q. Do you know how many car-loads there were?

A. I think there were six.

Q. Have you any means of knowing how many were contained in each car?

A. Only what the records show.

Q. Can you give us the figures from the record?

A. Yes, sir.

Q. Please do so, then.

(Witness produces book.)

2 cars, billed John Guthrie to C. G. Means, contained 16 cattle in each car.

# 8014,	C. S. Lyons	to	C. G. Means,	contained	18 cattle.
# 1214,	"	"	"	18	"
# 6116,	"	"	"	18	"
# 325,	"	"	"	15	"

Q. State whether or not these cattle were all yarded together.

A. The cattle were unloaded separately into our loading chutes and delivered from the chutes to the consignee.

By the COURT: That does not answer the question. State whether or not they were unloaded at the same time.

A. Not by the yard Co. They were delivered separately.

Q. What do you mean by separately?

A. Each car-load by itself. Each car-load was unloaded into a chute by itself and was delivered there. Our records do not show that they were put together.

150 Q. It shows that each car was kept separately?

A. Yes, sir.

Q. How are they delivered? What constitutes a delivery?

A. The yard Co. unloads this stock into chutes and keeps each car-load separate.

Q. What is the object of keeping them separate?

A. So as to keep our records. We keep a record of every car-load we receive.

Q. And of how many cattle they contain?

A. Yes, sir.

Q. That is the object?

A. Yes, sir; and at the request of the consignee or any owner of the cattle we count the cattle from these chutes and deliver the cattle to the consignee.

Mr. J. K. SOUTHEY, a witness called and sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Judge STYLES:

Q. Where do you reside?
A. At Kansas City.
Q. What is your business?
A. Cattle-buyer for the Armour Packing Co.
Q. How long have you been in that position?
A. Four years next February.
Q. Did you buy these ninety-eight head of cattle in question?
A. Yes, sir.
Q. Bought them of whom?
A. Bought them of Means & Sons; salesman, Wells.
Q. How much did you pay for them?

Judge JACKSON: I object to that. It is not within the issues of the case.

Overruled, defendants excepting.

151 Q. What did you pay Means & Sons for the cattle?
A. I do not remember, sir.
Q. Don't remember what they sold for per head?
A. No, sir.
Q. What time of day was it that you bargained for the cattle?
A. I bought them after dinner, sir.
Q. After noon?
A. Yes, sir.
Q. Do you recollect how long after noon?
A. Somewhere in the neighborhood of 2 o'clock.
Q. Would you say it was between 2 and 3 o'clock?
A. I could not say whether it was a few minutes before 2 or a little after. As soon as the cattle were bought they went to the scales, and the scale book would show the time of day.
Q. To refresh your recollection, I have a written statement here in which you state it was between two and three.
A. It might have been a few minutes before and it might have been a few minutes after. I do not remember now. I know as soon as the cattle were bought we cut out four at a different price and followed them to the scales.
Q. How were the cattle paid for?
A. I signed a ticket. That is all I know about it. The cattle, of course, were paid for. I signed a ticket as soon as I bought the cattle.
Q. What is the custom usually of the Armour Packing Co., and your custom, in regard to the payment for cattle?
A. When a bunch of cattle come in—say there is a hundred—say we pay 4c. a pound—the face of the ticket shows the weight when

the commission man gets them. That is all I have to do with it. I don't know how they collect the money. It is none of my business.

Q. You don't know whether Mr. Means received the money—whether he received it that day or the next?

152 A. I could not say.

Q. This amounts to an order, then, to the packing Co. to pay the bearer of the holder of the ticket you gave?

A. Yes, sir; I suppose the ticket is the same as money.

Q. Have you anything with you by which you can get the amount you agreed to pay?

A. I have not.

Mr. R. B. BUFFUNGTON, a witness called and sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Judge STYLES:

Q. Where do you live and what is your business?

A. I live in Kansas City, Mo.; my business at the present time is purchasing agent for the Kansas City Stock Yards.

Q. What was your business at the time these 98 head of cattle were shipped into the stock yards?

A. I was weigh-master.

Q. When these cattle were sold to the Armour Packing Co., did you act as weigh-master and weigh them out?

A. I suppose I did.

Q. Do you recollect your weights?

A. I could not tell only by referring to the books.

Q. Have you got anything that you can refer to to show?

A. Yes, sir.

Q. You may get it, if you please.

(Witness produces a book.)

Q. State the total amount, that would be the quickest way of getting at it, if you can.

A. 94 cattle counted out from Lyons to A. P. Co. (We abbreviate the Armour Packing Co. by just marking A. P. Co.) 4 head weighed 4,855 pounds; 4 head, weighed separately, weighed 4,910.

153 Q. Making 98 head altogether?

A. Yes, sir.

Q. Were they weighed as one bunch?

A. Yes, sir—that is, they came to the scales one bunch. They were weighed in four different draughts.

Q. Why were they weighed in four different draughts?

A. The scales were not large enough to get them all on at once.

Q. If they had been they would have been all weighed together?

A. Yes, sir; with the exception of four.

Q. Do you know the amount that was to be paid for the cattle?

A. No, sir.

Q. You have no means of knowing?

A. No, sir.

Q. What time of day was this when you weighed them out?

A. I judge by the records here it was a little after 2 o'clock.

Q. That is when you weighed them out?

A. Yes, sir; it shows here. I have no mark on the book only at the time of closing the scales. They closed at 3.20 p. m., and by the amount that was weighed on them should judge it was probably 2 or 20 minutes after 2 o'clock.

Q. Between 2 and 3 o'clock?

A. Yes, sir.

Cross-examination by Judge JACKSON:

Q. Can you, from that estimate of the amount of weighing done after these draughts, this last draught, approximate the hour at which the weighing was done?

A. I can—that is, to a certain extent. It is partly guess-work.

154 Q. How do you determine that—the hour of the weighing?

A. It is marked on the book here.

Q. Can you give the exact hour from the mark on the book?

A. Yes, sir; it is marked here at the time we closed the scales.

Q. Now, then, how do you determine the hour in the day certain weight was made by you?

A. How I judge by that is the number of draughts that were made after that bunch of cattle were weighed up to the time of the closing of the scales.

Q. Now, if there was a rush in the weight of cattle your books would show a greater number of draughts than they would if there was fewer lots to be weighed, would they not?

A. Yes, sir.

Q. Now, can you tell from recollection or from your record what number—what time intervened between the weighing of these cattle and the time of the closing of the scales?

A. I could not, only with one statement that I remember distinctly, and that was this: It came up a short time after these cattle were weighed—that is, I say a short time, probably a week or ten days. There was a certain party—I don't know who he was, I did not know who he was at the time—came in there wishing a statement of the time they were weighed, and I gave him a statement, to the best of my recollection, that they were weighed at 2 or 3 o'clock.

Q. Now, was that recollection or impression based upon the record you kept or upon memory?

A. It was based then upon the record and also at that time I remembered something about the cattle. That was the only way I could do it.

Q. Can you tell now whether it was about two o'clock that the weight was made?

A. That is my recollection—that it was two or probably 20
155 minutes after two; in that neighborhood.

Redirect examination by Judge STYLES:

Q. You say at the time you made the statement you had some recollection in the matter. Now, recollect if at that time you recognized the statement as correct, whatever it was.

A. Yes, sir.

Q. Look at that statement on the card and see if it is the one to which you referred.

(Witness examines the card.)

A. Yes, sir.

Q. The statement there is between two and three, is it not, signed by you?

A. Yes, sir.

Judge STYLES: We offer that in evidence. (Card and question marked Exhibit G.)

By Judge JACKSON: This memorandum that is offered as evidence is objected to. It certainly is no evidence.

By the COURT: It will be excluded.

J. W. PETERSON, a witness called on behalf of the plaintiff, having been duly sworn, testifies as follows:

Direct examination by Judge STYLES:

Q. Mr. Peterson, where do you reside?

A. Concordia, Kansas.

Q. What connection have — with The Bank of Randall, plaintiff in this case?

A. I am a director and stockholder.

Q. Were you such at the time of this transaction—Sept. 15th, 1887?

156 A. Yes, sir.

Q. State what interview you had with Mr. Means shortly after the protest of the draft, and what, if any, demand you have made upon him.

A. As soon as we learned of the protest I telegraphed, probably in two or three days—we learned of it sooner—but in two or three days, the second or third day after the protest of the draft, I went to Kansas City, to Means' office. I was acquainted with him, although he probably did not know of my connection with the bank. I had some talk there then in regard to this case and the payment. I had the draft with me and wanted Mr. Means, asked him, to settle—that is, for the cattle.

Q. For the proceeds of the sales?

A. Yes, sir; for the proceeds of the sales. He refused to. I had no other conversation with him.

Q. How long was that after the protest?

A. This first conversation?

Q. Yes; in which he refused to pay you for the proceeds of the cattle.

A. I should say not to exceed three or four days, probably the second or third day.

Q. What, if anything, did he state at that interview in reference to what he had done with the money which the cattle brought and for which you made demand?

A. He said that Mr. Lyons was owing him on old accounts and that he applied the proceeds of the sale of the cattle to that old account. I think he said he had a note also. He also said he had a note yet, but that he had not said anything to Mr. Lyons about it.

Q. Note for what?

A. I asked him what he had done with the note; if he had
157 given it to Mr. Lyons. He said he had still retained it. I asked him if he had said anything to Mr. Lyons about it. He said, "No."

Q. Do you mean the note to which he had applied a part of the payment?

A. Yes, sir.

Q. State if you had any subsequent conversation with him.

A. Yes, sir; I did, a few days later, in the office of Warner, Dean & Hagerman, Kansas City.

Q. Do you recollect who were present at that meeting?

A. Yes, sir; Mr. Dean, I think; Mr. Means, of course, and myself.

Q. State what conversation was had there.

A. The conversation was with a view of settling for the cattle and was an appointment I had made with Mr. Means at his office in a previous conversation. I was there more than once about that time, perhaps, but on that occasion I made arrangements to meet him in that office.

Q. For what purpose?

A. For the purpose of agreeing on a settlement for these cattle, and I went there for that purpose, and I again ask [asked] him.

Judge JACKSON: I object to that. You can state what occurred, what was said at that conversation. State what was said at that conversation with reference to the settlement of this desired claim.

By Judge STYLES: We merely want to show that he again refused to pay it as the wind up.

Q. What, if any, refusal did he make as to your claim for the proceeds of the cattle or proceeds of the claim in that conversation?

A. I demanded again—I asked him what the proceeds were, and he said 6,100 and some odd dollars——

Judge JACKSON: We object to that conversation occurring
158 at a time when they met, as the witness said, by preappointment to settle this controversy.

A. I told him I would receive the amount stated by him as the net proceeds of sale.

Q. What did you say it was?

A. Somewhere in the neighborhood of $6,150. It was less than $6,200 and over $6,100, and he produced as evidence the amount as

given by him, according to his statement, as the net proceeds of the cattle in settlement of our claim against him.

Q. State whether he refused that.

A. Yes, sir; he refused that.

Q. What, if anything, did he say as to what he had done with the money—with the proceeds of the cattle—which you are endeavoring to get?

A. He repeated his former statement substantially in regard to its being an old account which he had had with C. S. Lyons and with the former old firm of Parsons & Lyons.

Q. What is your best recollection of the amount he said he had received for the cattle?

A. I will say this—that last night Mr. Means said it was $6,133. That was the exact amount given me last night; but from the conversation then had I remember only that it was over $6,100 and less than $6,200; somewhere in the neighborhood of half a hundred.

Cross-examination waived.

Mr. SMITH: We will consider these papers that have — offered in evidence as read. We will read them in argument, if desired.

And said cause was adjourned until Thursday, the 27th day of December, 1888, when the defendants offered and tendered in court, in support of the issues upon their part, the following evidence, to wit:

159 The deposition of J. K. McLAIN as follows, omitting caption:

"Prior to the shipment of the stock sued for herein said C. S. Lyons was indebted to said witness in the sum of exceeding $2,500, and the said indebtedness was paid by the said defendants out of the proceeds of the sale of said stock, which payment was made to me after said cattle had been received by defendants and during the same day that said cattle were received."

Defendants also called as a witness C. G. MEANS, one of the defendants, who, being sworn, testified as follows:

Direct examination by Judge JACKSON:

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. You may state if you had an interview with Mr. Lyons a few days prior to receiving the cattle in controversy.

A. Yes, sir.

Q. State where that conversation took place.

A. At the Kansas City Stock Yards.

Q. What was said between Mr. Lyons and yourself in reference to the shipment of cattle by Lyons to your firm?

A. We had some conversation before that, or did you want just that conversation?

Q. Just state what other conversation you had prior to that about the same matter.

A. Mr. Lyons had been shipping stock to me for some time at the Kansas City Stock Yards. I had been selling for him. Sometimes he would have his account up pretty nearly square and sometimes he would be behind. Sometimes he would have a good bit of money to his credit and sometimes be owing of us. They went under the firm name of Lyons and Christianson sometimes. Along
160 about a month before that—some time in August—Mr. Lyons came to me, and said he, "Mr. Means, we are behind some with you," and said he, "I would like to pay it; me and Ed. have had a falling out"——

Q. Ed. was his partner's name?

A. Yes, sir; Christianson; said he, I have got some property and I want to do business by myself and want to pay you up what I owe you. Said I, All right, Lyons; I will be glad to get it. He went on shipping stock to me, and shipped in the name of C. S. Lyons, and about a week ago they made this shipment—I think on the 15th. I think about the 8th of the month he came into Kansas City with two or three cars of stock, and that day——

Q. What day was that?

A. I think about the 8th; I would not be certain; I could refer to some papers, I expect, if I could get them, and be positive. I says to Lyons, says I, You are not squaring it up. Said I, What is the matter? Said he, I have got some money paid out on stock that I am going to ship in next week, and then I will be ready to meet the demands you make on me, but I cannot before that time. He said, I have got a lot of money paid out on stock now. I told him I would be glad to have him do so; that I had confidence in him all the time, and that all I wanted was my money, and I wanted him to pay that account. He said he would do it. Shall I proceed on?

Q. Just go on now.

A. The next transaction we had on the morning of the 15th. I was over on what we call the M. P. side. I was there when the train came in. One of my sons was there with me. I do not know whether he was right by me at the time I was there. I saw a train back, and I saw Paterson and Lyons on top of the cars. When they came up they got off the cars; they were both together. I saw Lyons, and went up and spoke to him. Said I, Lyons, what have
161 you got here? Said he, I have got six loads of cattle. Said I, Where did you get these cattle? He said, I bought them of Bob Paterson. I talked with him a little bit, and Bob walked away two or three steps; probably three or four steps. Said I, Lyons, are you ready to meet those demands to-day? He said, I have got these cattle here. Said I, Lyons, I want to know what you are doing; this thing has gone about as far as I want it to. I said, What did you pay Bob for these cattle? Said he, That is a private contract between me and Mr. Paterson. He said, I have bought these cattle, and I have bought 143 head of other cattle, and I have got in some money paid on them. I said, Lyons, I think it is jus-

tice to me that I know what these cattle cost, and I want to know what you are doing. I turned on around and didn't go two steps toward Paterson and I met him again. Said I, Bob (I call him by the familiar name, as I have been acquainted with him for a good while), said I, Bob, did you sell these cattle to Lyons? Said he, Yes. Said I, I want to ask you a question. What did he pay for these cattle? Said he, He bought these cattle and paid for them, and that is enough for you to know, and said he, He paid me money on the other cattle. Said he, These cattle will make money. Said he, I will give you $50 myself for the profit on these cattle over and above what they cost. After I had talked to them both for awhile I talked to Mr. Patterson again separately in the presence of Mr. Wells—that is, Mr. Wells was not present at the time, but I went and got him. Said Paterson, I want to ask you a question. I have been acquainted with you for a long time and want you to tell me, said I, what these cattle cost, so I may know what I am doing. Said he, I told you once that I sold these cattle to Lyons and he had paid me for them, and that is enough for you to know. That is all I could get out of him. I made up my mind then——

162 Mr. SMITH: We object to what you made up your mind to. Go on and state your conversation.

A. At that time, after I had failed for to get it out of Mr. Patterson, I went to work and sold the cattle and took the money—took the ticket of the house—that is, I sold the cattle a little after—somewhere near two o'clock, between one or two, or near that. I sold the cattle and walked to the house with the ticket and walked into my office and said to the book-keeper—I said, Here is the ticket for the money.

Mr. SMITH: I object to that as incompetent. This is a conversation with his book-keeper.

By the COURT: Pass by any conversation with your book-keeper.

A. I had it placed to the credit of Lyons on his account, and also got a check at the same time, and went and paid, that same evening, Mr. McLain for $2,500 and some odd dollars that we had went security for Mr. Lyons some time before that. That was somewhere between three and four o'clock that I took the check and went uptown.

By Judge STYLES: Took what check, the check to pay McLain?

A. Yes, sir; the check to pay McLain—the stock-yard check—and went to the bank and got a check there, I think, and paid him with the stock-yard check.

Q. State if you had at any time a conversation with Lyons about a draft on these cattle.

A. Along that evening, about the time I started uptown, was the first I heard about a draft on them cattle that day from Mr. Lyons, Patterson, or any one else.

Q. State from whom you heard that and what the conversation was.

A. As Lyons started between three or four o'clock, I walked with

him out to the railroad track, and we were talking in regard
163 to the cattle, the sale of them and what I thought in regard to the future of next week's market. Said he, I want to ship them other cattle. Said he, Do you think that would be a good time? Said I, I don't know how the market is going to be. I don't know anything about it.

By the COURT: That is immaterial. Get to the point.

Judge STYLES: We object to that as hearsay.

The WITNESS: Mr. Lyons said to me at that time——

By the COURT: We want to know what he said about the check.

A. Mr. Lyons said to me at that time, Had the draft come in yet? That was all I heard about the drafts.

Q. What time in the day did you say that was?

A. It must have been between three and four o'clock.

Q. You say that was the first you heard about the draft?

A. That was the first I heard about the draft from either Lyons or Paterson.

Q. What other conversation did you have with Lyons or Paterson, either, in which the draft was mentioned on that day?

A. No other conversation. I have no recollection of any other conversation in which the draft was mentioned between Patterson and Lyons on that day.

Q. You may state if you have any knowledge of the draft being presented at your office.

A. I had no knowledge and could not. If the court will allow me the privilege, I will state I asked my son——

By Judge STYLES: I object to that as incompetent.

By Judge JACKSON: That would not be competent, what your son said to you.

Q. You may state who was your book-keeper at that time.

A. Mr. John D. Keiley.

Q. What, if anything, do you know of a draft being pre-
164 sented on that day?

A. I do not know anything of it myself, only I heard so.

Q. You may state what the custom is as to the presentation of drafts drawn upon you to Keiley or to a member of the firm.

A. I would like to make a little explanation here if the court will allow me.

Q. Just state in reference to that custom.

Objected to as incompetent.

A. It is a custom through some six or seven banks there at Kansas City. The Stock Yards Bank is considered their agent. It is made up of them six or seven banks. These collectors—these young men—will go around in the morning with these drafts. They will come to our book-keeper and say, I have got such and such a draft. The book-keeper will say probably, if there is nobody else there, Well, leave it in the bank, or something of that kind. Mr. Keiley has no authority to say that any draft is good or that it will — paid in any way.

Q. What authority or what has been the custom in accepting or refusing to accept drafts or checks upon funds on your account or handling your funds in any form?

A. He don't handle them unless according to my directions—mine or my son's.

Judge STYLES: I object to that as immaterial.

165 Q. What transactions, if any, had you had before this with the Bank of Randall?

A. We had bought some drafts, I think, through that bank.

Q. Through the Bank of Randall?

A. Yes, sir; two or three drafts, I think.

Q. What, if any, transaction had you had before that time with the Bank of Randall in which drafts were drawn upon bills of lading?

A. I do not know. We have had some that were drawn through bills of lading and some that were not. I will not be certain as to that point.

Q. What was the ordinary course of business in the stock yards there as to drawing drafts upon bills of lading or drawing upon the Stock Yards Co.?

Objected to by plaintiff as too far outside of the question; sustained, defendants then and there excepting.

Q. Mr. Means, you may state, then, whether this Bank of Randall had on other occasions drawn drafts upon shipments to you.

A. They had, I think, sometimes.

Q. You may now state whether or not you ever had any notice of the drawing of such drafts on you.

A. No; I never had; I never had a line that I know of; I don't recollect any.

Q. Do you remember about what time in the day this stock was sold?

A. Yes, sir.

Q. How long before the conversation you had with Lyons in which he advised you of this draft?

A. That was before the conversation I had with Mr. Lyons.

Q. How long before?

A. An hour and a half, probably.

Q. You may state what the stock sold for.

A. It was sold—I may possibly get a dollar wrong—but
166 the amount that the stock brought was $6,133. It was $465 or $565; I won't say which now. I think it was $465.

Q. About how much do you think the entire lot sold for?

A. After paying the expenses of the shipment they brought $6,133, I think, and some cents.

Q. You may state now, if you know, what the two cars shipped in the name of Guthrie sold for.

Q. You may state, then, at the sale price, what the two cars shipped by Guthrie would amount to or do amount to.

A. They were all sold together.

A. About one-third of the net proceeds of the six cars. There was not hardly so many cattle in them, but I think probably they must have been heavier cattle. They loaded, I suppose, for to fill the cars, but I don't know.

Q. What conversation, if any, did you have with Mr. Lyons in reference to the two cars of cattle shipped in the name of Gutherie?

A. He said they were his'n.

Q. Did you have any talk with Gutherie about that?

A. Yes, sir.

By Judge STYLES: I object to that.

Q. In the presence of Lyons I would say?

A. When we went to settle for the cattle in the evening I went to Gutherie.

By Judge STYLES: Lyons was not present, then?

A. I think he was. Yes, we were all in the house—in my office. I asked him—Gutherie asked him—if they were his. First he said they were his cattle.

Judge STYLES: They were whose cattle?

167 A. Lyons' cattle. I went to Gutherie and he said they was Lyons' cattle. I said, In order that this thing may be done properly you had better give me an order for them, so that this account may be properly credited to Lyons. I wrote out the order and he signed it.

Q. You may state if this is the order given you at that time by Mr. Gutherie (presenting the witness paper dated 9, 15, '87, signed John Guthrie, hereinafter copied in full on page 126 of this bill of exceptions).

A. Yes, sir.

Q. You may state if Mr. Lyons was present at the time that was given?

A. Yes, sir. Mr. Patterson was present, too. They were all three present at the time; yes, sir.

Q. You may state now fully whether this conversation occurred before or after the making of the draft so spoken of.

A. It occurred before.

Q. How long before?

A. Probably a half hour, maybe an hour. I do not know how long before.

Q. What, if anything, was said in regard to the number of cars against which the draft was drawn?

A. Not a word said.

Q. What, if anything, was said in regard to the draft being drawn against the cattle shipped by Gutherie?

A. Not a word; not a word. All that was ever said in regard to the draft or their being shipped by Lyons, Gutherie, or Paterson was that Mr. Lyons made use of the language and asked if the draft had been paid, but nothing about any bill of lading or anything else.

Q. Did you have any conversation during the day about any application of the proceeds of sales upon your account?

A. No; I had no conversation whatever about what I would do with the sales.

Q. Had no talk with him?

168 A. No, sir; had no talk with him.

Q. You may state when you first saw the draft yourself.

A. I saw it—it must have been somewhere near four o'clock that evening.

Q. When it was presented?

A. No; I went into the bank myself and saw the draft.

Q. You went into the Stock Yards Bank and saw the draft?

A. Yes, sir.

Q. You may state when you first learned upon what number of cars of cattle the draft was drawn.

Judge STYLES: I object to that as immaterial.

Q. You may state when you first saw the bill of lading.

A. I do not know whether I saw that bill of lading that evening or not. I saw the draft, but I do not think I saw the bill of lading. I think I saw it in the evening after I got the cashier's check. I asked him, possibly, if there was any draft on the cattle in the bank, and they spoke something about it.

Judge STYLES: They spoke something about a bill of lading?

A. No, sir; nothing said about a bill of lading whatever.

Q. They spoke about a draft being there?

A. Yes, sir; that is all I have any recollection of.

Q. Do you know whether you ever saw the bill of lading?

A. I do not know whether I ever saw it. I think probably I saw it the next day; I know I saw it the next day.

Cross-examination by Mr. SMITH:

Q. How long have you known Mr. Lyons?

A. Ten or twelve years.

Q. How long have you been engaged in the commission business in Kansas City?

A. Eight years.

169 Q. You have had dealings with Lyons during that time—have had numerous dealings during your acquaintance with him?

A. Yes, sir.

Q. Did he ship cattle to you in the fall of 1887, prior to September?

A. Yes, sir.

Q. Frequently?

A. He shipped some cattle from Randall; not a great many.

Q. Those were always accompanied by bills of lading or drafts on the Bank of Randall, were they?

A. I do not think they were. I have no recollection of seeing any bills of lading before.

Q. Drafts were always drawn on them, were they?

A. I won't be positive.

Q. These drafts were always paid by you before, weren't they?

A. I think so, sir.

Q. When did this indebtedness which exists in your favor against Lyons originate?

A. As I said in the outset, for the last three or four years Mr. Lyons would be owing to us probably two, three, or four thousand dollars; then he would fix it up and in the course of a month, or two months maybe, he would have a credit coming to him.

Q. How much was he owing you on the 1st day of Sept. prior to this shipment?

A. I cannot tell exactly, but something over $5,000.

Q. How was that indebtedness evidenced?

A. He was owing this much by this McLain note.

Q. How much was this McLain note?

A. There was $2,500.

Q. Who made that note to McLain?

170 A. C. S. Lyons.

Q. C. S. Lyons alone?

A. C. S. Lyons and Lyons and Christianson.

Q. Was not all this indebtedness referred to the indebtedness of Lyons & Christianson?

A. No, sir; not all of it.

Q. How much was the individual indebtedness of Lyons?

A. I think his indebtedness by himself was something over $1,000.

Q. When did that originate?

A. That originated in the last week or ten days or two weeks from the time they made the shipment.

Q. How did that originate?

A. By overdraft from the Bank of Randall and other indebtedness.

Q. Then the substance of it was the indebtedness of Lyons & Christianson, the old partnership?

A. Mr. Lyons kept the money himself.

Q. I ask you if it was the note of Lyons & Christianson.

A. Yes, sir; signed Lyons & Christianson.

Q. Was it endorsed by you?

A. Yes, sir; endorsed by C. G. Means & Sons as security.

Q. You had not paid the note up to that time?

A. I paid it that time.

Q. He had not paid it prior to the time?

A. I do not think it had been paid before, for I went by that time and paid him.

Q. You had never been obliged to pay this security debt, had you, up to that time?

A. No, sir.

171 Q. You were simply liable as security?

A. Yes, sir; liable as security.

Q. Now, under what circumstances did this indebtedness of a thousand dollars of Lyons' individual indebtedness arise?

A. On about the 8th of September; somewheres along there; at the time that these cattle, three or four car-loads, were shipped.

Q. Weren't they accompanied by a draft drawn by the Bank of Randall?

A. My best recollection is that they were.

Q. The draft was drawn on that shipment of two or three car-loads on the 8th of Sept. by the Bank of Randall?

A. Yes, sir; I think so.

Q. There was no difference in the transaction of the 8th of Sept. and the transaction of the 15th of Sept., was there, about the shipment?

A. No, sir; no difference in that respect. They were both accompanied by drafts. I cannot tell you whether there was any bill of lading or not. I did not see a bill of lading. I said they were both accompanied by drafts.

Q. Your best recollection is that the two transactions were the same, so far as the drafts being drawn with the shipments is concerned?

A. I think so.

Q. If a draft was drawn on the shipment of the 8th of Sept. by the Bank of Randall how did any indebtedness arise against Lyons for a thousand dollars?

A. Mr. Lyons came in, too, I might say, himself at that time and he drew this draft for something more than the stock came to through the Bank of Randall, and after he drew it I told him before he left, You know that I was going to ship some stock next week, and told him the amount of his draft. Now, said he,
172 I have got this money paid out on the stock that I am going to ship in next week, and, said he, if you would carry this thing over until that time then you would be able to get your money.

Q. How much more did he draw on the 8th of Sept. than the cattle came to?

A. I think it was about five or six hundred dollars.

Q. Then it was five or six hundred dollars instead of a thousand, was it not?

A. The rest was probably from the week or so before that.

Q. What was that occasioned by?

A. Shipments that were got before that.

Q. From Randall, or where?

A. I do not know from where.

Q. It came from shipments before that from the old firm of Lyons & Christianson?

A. No; that was in August. I said that was in August.

Q. On the 8th of Sept. you think Lyons was owing you between five and six hundred dollars, do you?

A. I think after he had commenced business for himself it must have been about $400 on the 8th of Sept. that he owed personally at that time.

Q. On the 8th of Sept. he owed $400, you say?

A. Yes, sir; about that, I think.

Q. How was that indebtedness increased after the 8th up to the 15th?

A. By overdrafts from the Bank of Randall.

Q. On what shipments?

A. The stock that was shipped on the 8th. Now, this was after the 8th we paid this draft—it might have been on the 9th or 10th that the draft came in on the stock.

Q. Then you did not owe for any overdrafts at all? Did
173 you know how much the drafts were to be?

A. Mr. Lyons told me what the draft was after I asked him about them there.

Q. How much did he say they were?

A. I think it was $2,800.

Q. How much did the cattle amount to?

A. I think it was $2,300.

Q. Then there was between four and five hundred dollars that was due you before that?

A. Yes, sir; and that made it something over $1,000.

Q. Do I understand that there was another shipment made through the Bank of Randall besides the shipment of the 8th of Sept.?

A. I think there was. Some of them shipments had no bill of lading. I don't know what one it was—that is, I understood they had none.

Q. Now, going back to the 15th of Sept., you were expecting these cattle down there, weren't you?

A. I was expecting Mr. Lyons to make a shipment of some kind or another to close his indebtedness.

Q. You were expecting that he would ship them from Randall, weren't you?

A. No; I don't think he had stated where he would ship from.

Q. Hadn't he shipped all his cattle from Randall?

A. For the last week or ten days he had; before that he had shipped from Scandia. My impression is that was before the 8th of Sept.

Q. Did you expect him in on the morning of the 15th?

A. He said if he lived he would be there that week, sure?

Q. You were expecting him at the time, were you?

A. Yes, sir; I was looking for him.

Q. You and your sons were out watching for the trains to
174 come in, weren't you?

A. Not particularly. We were there on other business, and it is always our business to watch every train that does come in. He and Patterson were together.

Q. What time in the morning was this?

A. It was about 9 o'clock, sir.

Q. Down in the stock yards proper?

A. Yes, sir.

Q. How long did you stay down there with them?

A. I stayed there and talked to these gentlemen probably about half an hour. I told them for to go and get their breakfast and I would take care of the cattle.

Q. Then where did you go?

A. I took the cattle over to the south side—the main side of the yard—and put them in pens.

Q. When did you go back to your office?
A. I don't know whether I went back just then or not.
Q. Did you go back before noon?
A. Yes, sir; I went back at noon, sure.
Q. Who was in charge of your office when you came in there?
A. Mr. Keily.
Q. Did Mr. Keily say anything to you about the draft being drawn on these cattle there?
A. Not a word.
Q. Did he tell you anything about what was going on in the morning?
A. Not a word.
Q. You were expecting a draft on these cattle, weren't you?
A. No, sir; I was not—not necessarily.
175 Q. You knew that with all other shipments made from Randall a draft was drawn on the cattle, didn't you?
A. I might have and I might not have known it. I know it seems to me that there was one shipment made from there and there was no draft drawn.
Q. All you recollect had been accompanied by a draft, weren't they?
A. I know of one other shipment besides this one that had a draft on it.
Q. Did you ask your book-keeper anything about what occurred there in the morning?
A. No; I didn't ask him anything about it.
Q. About any other business?
A. We might have talked about some of the business one way or another.
Q. Who else was in the office besides your book-keeper? His office is your office, is it not?
A. Yes, sir; there is two offices there. He has a desk in behind.
Q. Who has charge in your office in the absence of your sons?
A. Mr. Keily keeps the books there.
Q. He has charge of the office in the absence of yourself and your sons, has he not?
A. He has charge of it this much: He keeps the books and accounts. He don't sign checks or transact any business of that kind. He cannot sign checks or assume any business or become responsible for any debts or make any checks, or anything of that kind.
Q. He transacts all your business, does he not, in your absence and your sons' absence?
A. In one sense of the word, he does.
Q. If a man comes there with a lot of cattle he takes charge of them sometimes, don't he?
176 A. No; he has nothing to do with it. He would probably notify me if necessary.
Q. What did you first say to Lyons when you first saw him on this train?
A. I asked him if them were his cattle.
Q. You say Mr. Keily usually notifies you what is going on?

A. Yes; it is his business, if the thing needs attention or anything of that kind, to notify me or one of the boys.

Q. Go on and state what you first said to Lyons.

A. I stated it once, but I will state it again, that I said to Lyons that I wanted to know of him if them were his cattle or whose cattle they were, and he said they were his.

Q. Who was with him at that time?

A. Mr. Patterson.

Q. Were you in the office after that?

A. I was down amongst the cattle most of the time. I went down in the yard after dinner and remained down in the yard.

Q. You sold the cattle about two o'clock, didn't you?

A. It may be a quarter after two; about that time.

Q. Who was in charge of your office when you were absent at that time?

A. Mr. Keily stayed there at the office.

Q. Anybody else?

A. Yes; one of my sons has to be there, and my other son had to be there. He would have been there, I suppose.

Q. After you sold the cattle what did you do—did you go back to the office?

A. Yes, sir.

Q. Who came up with you?

177 A. I don't know whether Mr. Patterson and Mr. Lyons were with me or not, but my impression is that they were. Mr. Patterson was there I know; he came up when I did,

Q. What did he talk about?

A. I don't know. He came into the office and I was talking to him about the cattle—trying to get out of him what the cattle cost.

Q. Why were you trying to get out of him what the cattle cost?

A. I wanted to find out what Lyons was doing. I was getting restless and wanted my money back; that was what I was trying to get.

Q. How long did Patterson stay there at that time?

A. Perhaps half an hour.

Q. Did Lyons come in in the meantime?

A. Lyons was in there, and so was the other gentleman.

Q. Mr. Gutherie?

A. Mr. Gutherie.

Q. Did you two go out together?

A. I think me and Mr. Lyons went out together. He started home first; that is my impression.

Q. Where was it that he asked you if the draft had come in yet?

A. When we got in front of the Exchange building, just about on the State line.

Q. How did he come to ask you about it?

A. We were talking about shipping them other cattle to Chicago or there, whichever would be the best place, and he said he believed the cattle would fetch more in Chicago than they would there; they were big, heavy cattle, and he thought they would fetch more there. He wanted to know what I thought about shipping to Chicago.

Then he just remarked had the draft been presented or been paid or something of that kind.

178 Q. What draft did you think he referred to?

A. I thought he referred to the draft on the cattle.

Q. You then knew there was a draft on the cattle?

A. I suppose there was.

Q. At that time you had not paid this security debt that you were on, had you?

A. No, but I had the cashier's check for it.

Q. You had not paid it, had you?

A. I had the check.

Q. Nevertheless, after you received this notice you went and paid this man, didn't you?

A. I had no notice of it.

Q. Did you ask him what the draft was?

A. No; I did not.

Q. Why didn't you ask him what the amount of the draft was?

A. I have just told you that I had no interest to know.

Q. You were trying to avoid receiving any information?

A. No; I was not trying to avoid it.

Q. Did you say here in the presence of this court and jury that you did not care anything about whether a draft was drawn on those cattle or not?

A. I don't know that I cared anything about it.

Q. You just made up your mind that you would get even with Lyons, didn't you?

A. I made up my mind that after Lyons and Patterson talked to me the way they did that it was my business to look out for and take care of my own interests.

Q. Why hadn't you done the same way on the 8th of Sept.?

A. Because Mr. Lyons promised me there and told me the

179 reason why he had been so behind was because he had this money out on the cattle.

Q. Why didn't you do the same on the 8th of Sept. that you did on this occasion?

A. Because I was looking for payment.

Q. You were looking for a bigger haul, weren't you?

A. No, sir; he told me he had this money out on other cattle.

Q. Weren't you waiting until he shipped in a large consignment of cattle before you closed in as you did?

A. No, sir.

Q. Why didn't you do on the 8th of Sept. as you did on this occasion? There was a draft of $2,800 then. Was that sufficient to pay it? You could have had that at that time if you had done on the 8th of Sept. the same as you did on the 15th of Sept.

A. The reason why I paid the draft on that day was——

Q. I didn't ask the reason why. I asked you if that was sufficient to pay up your indebtedness against Lyons?

A. No; not including this other debt.

Q. You watched until there came in a big enough amount to pay your indebtedness against Lyons; you also held a claim against

Christianson & Lyons, and also a claim you had on some paper given as security on the claim, didn't you?

A. I went to both of them, and I made up my mind that there was something wrong somewhere.

Q. I might ask you if you had waited until there was a sufficiently large consignment of cattle made before you attempted to collect out of any of these shipments against Lyons?

A. No; I didn't watch on that account.

Q. The shipment of the 15th of Sept. was about large enough to cover all your claims that you had against Lyons of any character, was it not?

180 A. No; it was not large enough.

Q. How much does he still owe you?

A. He owes for overdraft.

Q. For what overdraft.

A. Either on that shipment or on the shipment before, or some of them.

Q. We want to know something about this.

A. You can apply it on whichever one you are a mind to; I don't know which one it is.

Q. How much was your total indebtedness against Christianson & Lyons or Lyons & Christianson, whichever the firm name was?

A. Will you please allow me to ask you a question in there?

By the COURT: Didn't you keep a book account of these items?

A. Yes, sir.

Q. Where are your books?

A. My books are at home.

By the COURT: You have come up here to guess?

A. I have got a statement right here.

Q. Why didn't your clerk bring the books when he was subpœnaed to bring them?

A. I didn't know he was subpœnaed to bring the books; I never heard that before until yesterday evening. I can give the exact amount of Lyons' & Christianson's debt if you wish.

A. No; I don't care anything about that at present. Did you ever consult or did you consult—you had no conversation with Lyons about the proceeds of these cattle, had you?

Redirect examination by Judge JACKSON:

Q. You applied the proceeds of the sale upon his indebted-
181 edness upon which you were liable?

A. Yes, sir.

Q. I believe you said it did not pay up his full indebtedness?

A. No, sir.

Q. Now, in regard to the shipment made on the 8th of Sept. Did that shipment pay any part of his liability to you, or did his liability increase on account of it?

A. His liability increased.

Q. You paid an overdraft, then, at that time?

A. Yes, sir.

Q. Did you have an agreement about how that overdraft was to be repaid to you?

A. Yes, sir.

Q. What was that agreement?

A. His agreement was that he would ship in stock next week to pay me.

Q. Was this shipment received the first week of Sept. after the 8th?

A. Yes, sir.

Q. Was that the first shipment after that?

A. It was.

Q. When you received the money on the sale of these cattle you applied it on your account against him?

A. Yes, sir.

Q. Now, did you—I will ask you if you know, if you remember, about drafts being drawn by the Bank of Randall upon you or whether they were drawn and settled through the Stock Yards Co.?

Sustained by the court, defendants then and there excepting.

Q. You may state if your book-keeper was here yesterday and was subpœnaed by others.

A. Yes, sir.

182 Judge STYLES: He was subpœnaed to bring the books, too, and he didn't bring them; that is the reason we excused him.

Defendants also offered in evidence the order in writing identified and proven by the testimony of the witness, C. G. Means, as shown on page 110 of this bill of exceptions, transcript of evidence, of which the following is a copy:

9, 15, '87.

"Settle with C. S. Lyons for two cars of cattle billed from myself to you, per M. P. R. R., from Randall, Kansas. The cars are—

55 I. M.—Contained 16 head of cattle.

5608 " 16 " "

Respectfully, JOHN GUTHRIE."

When the defendants rested their case; and thereupon the court recalled Mr. PETERSON, one of the plaintiff's witnesses, who testified as follows:

The amount of interest from the 17th day of Sept., when I first made the demand, until to-day, the 27th day of Dec.—it was one year, three months, and ten days—amounts to $548.55, which added to the $6,133 makes $6,681.55, which makes the total amount.

Which was all of the evidence offered, tendered, heard, or received on the trial of said cause.

Whereon the court ordered and directed the jury to return into court a verdict in favor of the plaintiff and against the defendants—an assessment of damages in the sum and amount of six thousand

six hundred and eighty-one & $\frac{55}{100}$ ($6,681.55) dollars upon the evidence in said cause; to which ruling, order, and decision the
183 defendants then and there objected and excepted and prayed the court to submit instructs [instructions] to the jury upon the pleadings and evidence; which prayer the court refused and denied; to which refusal and ruling the defendants then and there excepted at the time.

And thereon, under the order of the court, the jury, through their foreman, returned into court their verdict in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS & SONS, Defendants. } Case No. 6078.

We, the jury in the above-entitled cause, duly empanelled and sworn, upon our oaths find for the plaintiff and assess its damages at $6,681.55.

(Signed) S. M. HUSTED, *Foreman.*

To the receipt and entering of which verdict defendants then and there excepted.

And thereon the court caused judgment thereon to be entered of record upon the records of said court; to the entering of which the defendants then and there excepted.

Within two days after the rendition of said verdict and, to wit, on the 29th day of December, 1888, the said defendants filed in said court and cause their motion for a new trial, which was in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
184 C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business under the Firm Name and Style of C. G. Means & Sons, Defendants.

Motion for a New Trial.

Come now the said defendants and move the court to set aside the verdict of the jury and grant the defendants herein a new trial for the following reasons:

1st. Irregularity in the proceedings of the court and abuse of discretion, by which the defendants were prevented from having a fair trial.

2d. Accident and surprise which ordinary prudence could not have guarded against.

3d. Because B. P. Waggener, Esq., has heretofore and up to the

26th day of December, 1888, when this cause was called for trial, had the sole and exclusive charge and management thereof, and because on said day, within a few hours before said cause was called for trial, B. P. Waggener, Esq., was taken seriously ill, and for that reason unable to attend the trial of said cause; and thereon said defendants made an application for a continuance because of said accident and illness, and supported the same by affidavits filed herein, which application was refused; and thereupon said defendants employed H. M. Jackson, an attorney-at-law at this court, to defend for them, and hereupon their said last-named attorney undertook to manage the defense of said action in the trial thereof without any preparation or opportunity to become acquainted with the facts and questions involved and at issue in said action.

4th. Because the assessment of the amount of recovery was too much, said action being upon a contract.

5th. Because the verdict is not sustained by sufficient evidence and is contrary to law.

6th. Because of error of law occurring upon the trial and
185 excepted to by the defendants.

7th. Because of the admission of incompetent evidence on the part of the plaintiff over the objection of the defendants.

8th. Because of the exclusion of competent and material testimony on the part of the defendants excluded upon an objection of the plaintiff.

9th. Because the court erred in instructing the jury to return a verdict in favor of the plaintiff for the amount stated in said verdict.

Affidavits, record, and oral evidence will be used on the hearing hereof.

(Signed) WAGGENER, MARTIN & ORR,
Attorneys for Defendants.

Endorsed: No. 6078. The Bank of Randall *vs.* C. G. Means, W. W. Means, and C. H. Means, partners doing business under the firm name and style of C. G. Means & Sons. Motion for a new trial. Filed December 29, 1888. Geo. F. Sharitt, clerk. Waggener, Martin & Orr, att'ys for defendants.

And did therewith file in said court and cause the affidavit of said H. M. Jackson in support of said motion for a new trial; which affidavit is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business under the Firm Name and Style of C. G. Means & Sons, Defendants.

UNITED STATES OF AMERICA,
State and District of Kansas, } ss:

H. M. Jackson, being duly sworn, upon his oath states that he was the only attorney representing the above-named defendants
186 on the trial of the above-entitled cause; that he had never been informed of the subject of said action nor of any fact relating thereto until the day of the trial of said cause was commenced and within two or three hours before the trial thereof began, when he was requested by Hon. B. P. Waggener, the attorney for defendants in said cause, to read the pleadings and to assist said B. P. Waggener in the defense of said action in case the said B. P. Waggener did not recover his health from his then temporary illness so as to be able to try said cause and in case the said cause was ordered to be tried by the judge of said court; that within one hour before the jury was impaneled in said cause affiant first consulted and advised with the defendants as to the facts, points, and evidence in said action, and that until after the trial of said cause had been in progress for three hours and after the afternoon adjournment of said court, on the day said trial was commenced, this affiant had no opportunity to examine and collect authorities upon said action to present to the court or upon which to frame and direct the course of the introduction of evidence, and that with no other preparation or opportunity for preparation than as above stated affiant entered upon the defense of said action for the defendants when the same was ordered to be tried by the judge of the said court after the application of the defense for a continuance had been refused and denied; and further affiant saith not.

(Signed) H. M. JACKSON.

Subscribed in my presence and sworn to before me this 28th day of December, 1888.

Witness my hand and official seal.

[SEAL.] (Signed) FRANK ROYSE,
Notary Public.

My commission expires on the 24th day of May, 1889.

187 Endorsed: No. 6078. The Bank of Randall *vs.* C. G. Means, W. W. Means, and C. H. Means, partners doing business under the firm name and style of C. G. Means & Sons. Affidavit of H. M. Jackson. Filed Dec. 29, 1888. Geo. F. Sharitt, clerk. Waggener, Martin & Orr, att'ys for defendants.

And thereupon said cause remained pending in said court till

on the 26th day of January, 1889, when said cause came on to be heard on said motion of the defendants for a new trial and the affidavit in support thereof, which, being submitted to the court, and the premises being seen and understood, was by the court overruled and denied; to which ruling and decision of the court the defendants then and there excepted at the time; and thereupon, by order of the court, time was extended 30 days from that date within which to tender a bill of exceptions in the above cause, and the order of the court was duly entered of record in the words following:

UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 26th day of November, A. D. 1888, proceedings were had and appear of record in words and figures following, to wit:

SATURDAY, *January* 26, 1889.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business as C. G. Means & Sons, Defendants. } 6078.

The defendants' motion for a new trial herein came on to be heard and was argued by counsel; on consideration whereof the court overrules said motion, defendants excepting. Defendant is [are] given 30 days from this date to file bill of exceptions. Execution is stayed for 30 days from this date. Supersedeas bond is fixed at $10,000.

188 Afterward and on Monday, February 4, 1889, the following order was entered of record therein:

THE BANK OF RANDALL }
vs. } 6078.
C. G. MEANS & SONS. }

Leave is hereby given defendants by the court to file exceptions herein by March 5, 1889.

The above and foregoing is a full, true, and perfect bill of exceptions in the above cause, and the same is allowed, signed, sealed, and by the court ordered to be filed in said cause as a part of the record therein.

Dated this 4th day of March, 1889.

C. G. FOSTER,
District Judge.

The above and foregoing is submitted as full, true, and perfect bill of exceptions this 18th day of February, A. D. 1889.

WAGGENER, MARTIN & ORR,
H. M. JACKSON, *Attorneys for Def'ts.*

Endorsed: Bank of Randall, plaintiff, *vs.* C. G. Means & Sons, defendants. Case No. 6078. Defendants' bill of exceptions. Filed Mar. 4, 1889. Geo. F. Sharitt, clerk. This bill is O. K.—E. H. Stiles.

189 In the Circuit Court of the United States for the District of Kansas.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business under the Firm Name and Style of C. G. Means & Sons, Defendants.

Know all men by these presents that C. G. Means, W. W. Means, and C. H. Means and J. K. McLain and J. C. Dold and Oliver Denton, of Osborne county, sureties, of Wyandotte county, Kansas, are held and firmly bound unto The Bank of Randall, the above-named plaintiff, in the sum of ten thousand dollars ($10,000.00), to be paid to the said Bank of Randall, its successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 4th day of February, A. D. 1889.

Whereas the above-named C. G. Means, W. W. Means, and C. H. Means prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Kansas:

Now, therefore, the condition of this obligation is such that if the above-named C. G. Means, W. W. Means, and C. H. Means shall prosecute said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, and if the said judgment shall be affirmed in the Supreme Court of the United States they shall well and truly pay such judgment, then this obligation shall be void; otherwise to remain in full force and virtue.

190

C. G. MEANS.
W. W. MEANS.
C. H. MEANS.
J. K. McLAIN. [SEAL.]
J. C. DOLD. [SEAL.]

Sealed and delivered in the presence of—
ELIJAH GATES.
C. C. COLT.

The words "fail to," in the last line but one of the above bond, erased before the execution thereof.

C. G. MEANS.
W. W. MEANS.
C. H. MEANS.
J. K. McCLAIN.
J. C. DOLD.
OLIVER DENTON.

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

C. G. Means, W. W. Means, and C. H. Means, principals on above bond, being duly sworn, depose and say and each for himself sayeth that he is worth the sum of ten thousand dollars ($10,000.00) over and above all his just debts and liabilities.

C. G. MEANS.
W. W. MEANS.
C. H. MEANS.

This bond approved this 5th day of March, 1889.

C. G. FOSTER, *Judge.*

Sworn to before me this 4th day of February, 1889.

WILLIAM V. CHILDS, [SEAL.]
United States Commissioner, Western Dist. of Missouri.

I approve the above bond and the sufficiency of the sureties thereto.

——— ———.

[Endorsed:] State of Kansas, county of Wyandotte. Bank of Randall, plaintiff, *vs.* C. G. Means, W. W. Means, and C. H. Means, defendants. Supersedeas bond.

UNITED STATES OF AMERICA, } ss:
State and District of Kansas, }

J. K. McLain, being duly sworn, upon his oath says that he is one of the sureties who signed the annexed supersedeas bond, and that the affiant owns and has in his own right real and personal
191 property of the value of twenty-five thousand ($25,000) dollars over and above all liabilities and exemptions.

J. K. McLAIN. [SEAL.]

Subscribed in my presence and sworn to before me this 19th day of February, 1889.

ALFRED H. COBB,
United States Commissioner for the District of Kansas.

UNITED STATES OF AMERICA, } ss:
State and District of Kansas, }

J. C. Dold, being duly sworn, upon his oath says that he is one of the sureties who signed the annexed supersedeas bond; that affiant owns and has in his own right real and personal property exceeding in value the sum and amount of twenty-five thousand ($25,000) dollars over and above all liabilities and exemptions.

J. C. DOLD. [SEAL.]

Subscribed in my presence and sworn to before me this 19th day of February, 1889.

Witness my hand.

ALFRED H. COBB,
United States Commissioner for the District of Kansas.

UNITED STATES OF AMERICA, } ss:
District of Kansas and County of Wyandotte, }

Oliver Denton, of lawful age, being first duly sworn, deposes and says that he is a resident of — State of Kansas and Osborne county.

That he is worth, over and above his debts, liabilities, and exemption, ten thousand ($10,000) dollars.

That he is surety on the above supersedeas bond, where The Bank of Randall is plaintiff and C. G. Means *et al.* are defendants, pending in the circuit court of the United States for the district of Kansas.

OLIVER DENTON. [SEAL.]

192 Subscribed and sworn to before me this 25th day of February, A. D. 1889.

ALFRED H. COBB,
United States Commissioner for the District of Kansas.

UNITED STATES OF AMERICA, } ss:
District of Kansas, County of Wyandotte, }

C. G. Means, of lawful age, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled suit of The Bank of Randall *vs.* C. G. Means *et al.*, pending in the circuit court of the United States for the district of Kansas.

That he is a resident of the State of Missouri.

That he is worth, over and above all his debts, liabilities, and exemption, fifty thousand ($50,000.00) dollars, consisting of property, both real and personal, situated in Atchison county, State of Kansas.

C. G. MEANS. [SEAL.]

Subscribed and sworn to before me this 25th day of Feb'y, 1889.

ALFRED H. COBB,
United States Commissioner for District of Kansas.

Endorsed: No. 6078. Bank of Randall, pl'ff, *vs.* C. G. Means *et al.*, def'ts. Bond. Filed Feb'y 26, 1889. Geo. F. Sharitt, clerk.

193 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy from the record of the proceedings of said court in case No. 6078, wherein The Bank of Randall is plaintiff and C. G. Means & Sons are defendants.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 14th day of March, A. D. 1889.

GEO. F. SHARITT, *Clerk.*

194 The United States of America to the Bank of Randall, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein C. G. Means, W. W. Means, and C. H. Means, partners doing business under the firm name and style of C. G. Means and Sons, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 5th day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

C. G. FOSTER, *Judge.*

195 [Endorsed:] Chas. B. Smith. # 6078.

I hereby certify that on the 7th day of March, 1889, at Topeka, Shawnee county, State and district of Kansas, I delivered a true copy of the within notice on Chas. B. Smith, of the firm of Rossington, Smith & Dallas, attorneys.

Service, $2.00.

W. C. JONES, *U. S. Marshal,*
By CHAS. HOWARD, *Deputy.*

196 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Bank of Randall, plaintiff, and C. G. Means, W. W. Means, and C. H. Means, partners doing business under the firm name and style of C. G. Means and Sons, defendants, a manifest error hath happened, to the great damage of the said defendants, C. G. Means and Sons, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right

and according to the laws and custom of the United States should be done.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 5th day of March, A. D. 1889.

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed.
C. G. FOSTER, *Judge.*

[Endorsed:] No. 6078. —— —— *vs.* —— ——. Writ of error. Filed March 5th, 1889. Geo. F. Sharitt, clerk.

197 In the Supreme Court of the United States.

THE BANK OF RANDALL, Plaintiff,
vs.
C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners Doing Business under the Firm Name and Style of C. G. Means & Sons, Defendants.

Writ of Error to the Circuit Court of the United States for the District of Kansas.

Assignment of Errors on the Part of Plaintiffs in Error.

Come now the said plaintiffs in error above named and say that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit: That by the records aforesaid it appears that judgment was given for plaintiff and against defendants therein, whereas by the law of the land it should have been given for the defendants and against the plaintiff.

The said court erred in refusing to continue said cause upon the application of the defendants.

The court erred in deciding that the defendants were liable to plaintiff for two car-loads of stock shipped in the name of John Guthrie and delivered by the railroad company to the defendants upon the order of said John Guthrie with the consent and under the agreement of C. S. Lyons, the prior owner thereof.

The court erred in holding that the two car-loads of stock shipped by John Guthrie were transferred by the draft of C. S. Lyons to the plaintiff, accompanied by the bill of lading covering the four other cars of stock shipped by C. S. Lyons. To recover the value of all said six cars of stock said action was brought against the plaintiffs in error.

198 The court erred in holding that the endorsement of the bill of lading of said four cars of stock shipped by C. S. Lyons transferred the two cars of stock shipped in the same train by one John Guthrie and by his order delivered to the defendants.

The court erred in instructing the jury to return a verdict for the plaintiff against the defendants.

The court erred in submitting the case to the jury upon the evidence without proper instructions of the court as to the law of the case as presented in the issues and by the evidence.

The court erred in directing a verdict without instructions to the jury as to the law of the case under the evidence of the plaintiff as introduced on the trial of said cause.

The court erred in admitting evidence on behalf of the plaintiff over the objection of the defendants, and especially the testimony of R. G. Patterson as to conversations with the cashier of plaintiff bank.

The court erred in excluding evidence on behalf of defendants and over their objections as follows, viz:

Testimony of R. G. Patterson as purporting to state the agreement with John Guthrie as to his going to Kansas City with the stock in controversy.

As to the conversations between the witness, R. G. Patterson, and Mr. Bramwell about the witness going to Kansas City at the time of the delivery of the stock to defendants.

The testimony of C. G. Means as to drafts drawn by plaintiff upon the defendants and settled through the Stock Yards Company at Kansas City, Missouri.

199 The court erred in refusing defendants a new trial upon the grounds therein stated and the affidavit and evidence in support thereof.

All of which are respectfully submitted for the consideration of the court.

B. P. WAGGENER,
JACKSON & ROYSE,
Attorneys for Plaintiffs in Error.

200 [Endorsed:] The Bank of Randall, plaintiff, *vs.* C. G. Means, W. W. Means, and C. H. Means, partners doing business under the firm name and style of C. G. Means & Sons, defendants. Assignment of errors on the part of plaintiffs in error.

Endorsed on cover: Kansas C. C. U. S. No. 1191. C. G. Means, W. W. Means, and C. H. Means, partners doing business as C. G. Means & Sons, plaintiffs in error, *vs.* The Bank of Randall. Filed August 9th, 1889.

146 U.S. 620

Office Supreme Court U. S.
FILED.
SEP 24 1892
JAMES H. McKENNEY

No. 390.

IN THE SUPREME COURT
—OF THE—
UNITED STATES.

OCTOBER TERM, 1891.

C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners, doing business as C. G. MEANS & SONS,
Plaintiffs in Error;
vs.
THE BANK OF RANDALL.
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

B. P. WAGGENER,
of Counsel.

H. M. JACKSON,
Attorney for Plaintiff in Error.

RANSELL PRINTING CO., ATCHISON, KANSAS

No. 390.

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1891.

C. G. MEANS, W. W. MEANS, and C. H. MEANS, Partners, doing business as C. G. MEANS & SONS,
Plaintiffs in Error;
vs.
THE BANK OF RANDALL.
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

The Bank of Randall, the defendant in error, commenced action in a state court of the State of Kansas, which was duly removed to the U. S. Circuit Court of that state, in which a second amended petition was filed by which the bank

sought to recover of the plaintiffs in error $6,700, on account of cattle alleged in the petition to have been sold by one R. G. Patterson to Charles S. Lyon, and an agreement between Patterson, Lyon and said Bank that such Bank should pay $6,600 thereon, and retain the title and right of possession thereof until such sum was paid, and that four car loads of said cattle would be shipped in the name of said C. S. Lyon, and two in the name of John Guthrie as consignors. That it was also agreed between said parties and the Missouri Pacific Railroad Company, that the plaintiffs waived no claim or title to said cattle or the money to be derived from the sale thereof, by permitting a part thereof to be shipped in the name of said John Guthrie, and also that they should all be delivered to the plaintiffs in error, and the proceeds applied to the payment of said $6,600. That a sight draft was drawn on defendants, and a bill of lading for four car loads of said cattle assigned, and attached to said draft. That the draft, with bill of lading, was presented, payment refused, duly protested, and judgment asked for the amount of the draft, $6,600. (Record pp. 35-38.)

Answer a general denial. That the defendant in error was a Savings Bank corporation duly chartered under the laws of the State of Kansas;

the advancement by plaintiffs in error to C. S. Lyon of $7,500 to be used in the purchase of stock to be shipped to and sold by plaintiffs in error as factors of said C. S. Lyon. That four car loads of said cattle were consigned to the plaintiffs in error, as per bill of lading; that no bill of lading was issued for two car loads of said cattle, and all of said cattle (six car loads) delivered to said defendants on the cars at the town of Randall were the property of the defendants, and in their possession before the bill of lading was delivered to the defendants in error. That the cattle, on their arrival at the stock yards at Kansas City, were by said Lyon and Guthrie delivered to the plaintiffs in error, and with their knowledge and consent sold, and the proceeds applied in payment of the claim of defendants in error for advancements so made on balance of account of previous business by them transacted as factors of and for said C. S. Lyon; to which a reply was filed.

When the case was called for trial December 26, 1888, defendants, (plaintiffs in error), presented affidavits for continuance on the ground of absence of one Wells, a material witness, stating that he would testify that on the day the cattle were delivered in Kansas City, said R. G.

Patterson and said Lyon came there together, and said Patterson told C. G. Means (one of the plaintiffs in error) that said cattle were Lyon's cattle; that he (Patterson) had sold them to said Lyon, and had his money.

And further, that said absent witness resided at Lyons, Kansas, until a recent date. That as soon as the case was set for trial a subpoena was sent for service on him and returned "Not found," and the same was not served, and his whereabouts was then unknown to plaintiff in error.

Such application was refused by the court, plaintiffs in error excepting. (Record pp. 42–3.)

Plaintiffs in error then asked that said cause be passed for a few days, owing to the sudden and serious illness of their attorney, Hon. B. P. Waggener, who had had the exclusive charge of said cause as their attorney, which was refused. And later. on the same day, plaintiffs in error applied for a continuance over the term upon the same grounds, and because of the increased illness of said attorney, supported by the affidavit of said B. P. Waggener, and said C. G. Means, and the certificate of attending physician. Such application was refused, and said cause called for trial. (Record pp. 43–45.)

Thereon H. M. Jackson appeared in said cause for plaintiffs in error without having any

knowledge of the case, and without opportunity to examine or prepare for trial.

As the court directed a verdict upon the evidence, it seems necessary to review the facts, and evidence, in the case. An examination of the testimony will show that the counsel for defendant in error directed the evidence, and, in fact, dictated the testimony of the witnesses, over the objection of opposite counsel, until the court finally said to counsel that if he wanted to testify he should be put upon the witness stand. (Record p. 92.)

TESTIMONY.

Dr. W. S. Wood, called for defendant in error, testified to receipt and presentation of draft, and refusal of payment (p. 46.) Also that said C. G. Means told him he would not pay the draft because Mr. Lyon owed the money, and it paid his own debt, and that Lyon was still indebted to him $61 or $71. (p. 47.)

On cross-examination the witness testified that he knew nothing about the receipt, presentation or protest of the draft except as he learned from others (pp. 47-8) That all he could remember of the thirty minutes' conversation was that

Mr. Means said he was not going to pay the draft because Lyon owed him, and he was going to pay himself. (p. 49).

H. C. Schwitzbel testified: Was assistant cashier of the Bank of Commerce. Received the draft. It was presented, and payment demanded. That a bill of lading was attached. (pp. 50–51.)

On cross-examination the witness testified that he did not know that he had seen the draft or bill of lading. Knew nothing of them of his own knowledge, and knew nothing of them except what he was told. (pp. 52–53.)

Mr. Connelly testified: Am cashier, Kansas City Stock Yards Bank. The draft came to me as notary, September 15, 1887 (p. 53). Presented it to defendants for payment between three and half past four o'clock p. m. Protested for non-payment (p. 54). It had been presented to Means & Sons before by their collector, between two and three p. m. (p. 55.)

On cross-examination, testified that he did not know to which of the firm he presented the draft. Did not know if the bill of lading was attached, or that he saw it (p. 56).

On re-direct examination, testified that such paper was usually put in the hands of the collector about two o'clock. That Mr. Keily was in

charge of the Means & Sons office. The draft was presented to one of the firm (p. 57.)

Being recalled for cross-examination, testified that he did not know that any of the firm of Means & Sons, other than C. G. Means or C. H. Means ever authorized the payment of drafts.

(The attention of the court is called to the manner of counsel, putting in the mouth of every witness the answer to be given. p. 65.)

Ed. Kingsbury testified: Age eighteen. Employed by the Bank of Commerce. Draft came to me for collection before ten a. m. Presented it to man behind the counter. Bill of lading was attached to it. He read it, and told me to present them to Stock Yards Exchange Bank (p. 58). Time before 11 o'clock a. m. Left it at bank about fifteen minutes after that (p. 59).

Draft and bill of lading offered.

On cross-examination, witness testified: It was not an unusual occurrence to have drafts of that size with bills of lading attached for collection. Instructions were, if not paid to leave at Stock Yards Bank (pp. 60–61).

Re-direct examination: Means & Sons' bookkeeper instructed me to leave this draft at Stock Yards Bank.

R. Wood Hickman testified: Was with last witness. Saw him present draft at 11 a. m. Do not know whom presented to, nor whether bill of lading was attached (pp. 61–62).

R. G. Patterson called. Reside in Jewell County. Am stock farmer. Contracted these cattle —ninety-eight head—to Charlie Lyon. Plaintiff paid for them (p. 63). I delivered cattle in the stock yards because plaintiff was to pay me draft drawn by Lyon on Means & Sons for amount of cattle consigned to them to sell, and return money to plaintiff (p. 64). Cashier of Bank of Randall represented the bank. Looked at the cattle to see if they would be satisfied to furnish the money. Bramwell (cashier of bank) *wanted me to go along to look after the cattle.* Bill of lading not issued for two cars, because Mr. Guthrie wanted to go. Two men could not get passes on the six cars of cattle. So two cars were billed to Mr. Guthrie for him to get a pass. *At Kansas City delivered all the cattle to Means & Sons* (p. 66). *Believe* I told Mr. Means the cattle were paid for. Bank of Randall paid me for them, but there was a draft on him. It was about noon. Cattle were unloaded in two different yards. I *think* Mr. Lyon told him there was a draft on the cattle (p. 67.)

On cross-examination, stated—I sold steers to Lyon at his house, ten miles from Randall.

He was to pay $65 per head, to be delivered at stock yards at Randall. Lyon was to pay that for four hundred and forty head. Arranged with Lyon about pay before that. I told the cashier of Randall Bank the cattle was in the stock yards. He went down and looked at them. Said he would pay for them. Don't know what else he said, nor what Lyon said. He said he would like to have me go to Kansas City. All I heard him say, all I know about it. When I put the cattle in the yards cashier said "All right," he would pay for them. Something said about a bill of lading, I don't know what. (p. 71.)

I said cattle contracted to Lyon and delivered to the bank. I put them in the stock yards. They examined the cattle and paid me for them. I sold them to Lyon. Helped to load the cattle. We both had charge of them. *Don't know it* Mr. Means and I had any talk about the cattle when we first arrived at Kansas City. Don't recollect that I had a talk with him in the stock yards about the cattle. Don't recollect seeing Mr. Means there while unloading, nor whether I told Mr. Means what I would give Mr. Lyon for his profit on the cattle. Don't recollect what conversation I had or Mr. Lyon had with Mr. Means. Don't recollect of telling Mr. Means anything only the cattle ought to sell for more money; that the Bank of Randall had paid for them and issued a draft on him. (pp. 74-75.)

I have been talking with the officers of the Bank of Randall to-day about telling Mr. Means that the draft was drawn on him for the cattle. (pp. 74-75.)

On redirect-examination, stated: Mr. Means and I were talking about the price of cattle. I told him it was too low; that they would not pay out the price he put on them—would not pay for the purchase money. (p. 76.)

And further testified: I do not recollect that I told him what the purchase money was. Think I told him how much was drawn against the cattle; that they were to be $65 per head. Think I told him about that. I didn't say how much the draft was. Don't remember Mr. Means stepping one side and asking me privately about these cattle, nor of the conversation with him in the office in the presence of Mr. Wells, nor a conversation between Mr. Means and Mr. Lyon. Do not recollect Mr. Means asking me what Lyon had paid for the cattle, or my telling him; "that was a private matter between Lyon and myself, if Lyon would tell him, it was all right" (p. 77).

I did not see the draft; did not hear amount of it. Don't know whether draft for $6700. Don't know whether $300 of it applied on other cattle purchased by Lyon. (p. 78.)

C. S. Lyon called. Testified: Contracted with Patterson for 246 cattle. Bought them on

the 13th. He and I went to the Bank of Randall to see if I could get the money. Told the cashier I wanted it the usual way. He said, "all right." Ninety-eight head drove over on the 14th. Billed out four cars. The cashier and Patterson went down and looked at the cattle. I went off to fix cars. That was all that was said between Bramwell, (the cashier) and I. I made draft on the 14th, $6700. (p. 79.)

There was nothing said as to where the cattle should be shipped. I drew draft on Means & Sons and gave to cashier, and got bill of lading and gave to him. Bill of lading not on other two cars, because Mr. Guthrie wanted to come down, and to get him a pass two cars were shipped in his name. At Kansas City cattle unloaded. Mr. Means was there. He asked me what I paid. I told him. (pp. 80-81.) Told Mr. Means draft on the cattle. Told him I had shipped him the cattle. Bank of Randall had furnished the money. Mr. Means asked Mr. Patterson if he had got his money. Patterson said he had. Mr. Means then asked him what I had paid for the cattle. Patterson said, "none of his business." (p. 82.)

On cross-examination stated: Draft drawn about noon. Do not know whether I had received the bill of lading then or not. The draft was not altogether for this stock. Mr. Means said, "What did you pay for these cattle?" I

did not tell him. He then asked Mr. Patterson, and he said, "It is none of your business. If Lyon is a mind to tell you, it is all right." Then I told Mr. Means some way there was a draft on the cattle. "We were talking in the morning and about four p. m." (p. 83.) Neither Patterson nor myself told Mr. Means how much I was to pay for the cattle. (p. 84.)

D. D. Bramwell, cashier of Bank of Randall, testified: On September 13th or 14th Mr. Lyon or Mr. Patterson drove up to the bank. Lyon came in. Said he had bought some cattle from Mr. Patterson and wanted to ship 100 head the next day. Wanted to know if he could arrange with us for the money. I asked him how he was going to ship. He said the usual way. His usual way was to give us security on the stock by giving us a bill of lading. I told him all right, if the cattle proved satisfactory. (p. 85.) Next day the cattle were brought in. I went to the yards and examined them. Told Patterson I believed the cattle would pay out Accepted them as sufficient security for the money to be advanced. They were to be delivered to us as security. (p. 86.) I agreed to pay on condition they were to be holden to us, and we were to have a bill of lading of the cattle. Bill of lading did not cover six cars. He explained that to get a pass for Guthrie it would be necessary to have cars billed in his name. That when they arrived

at the stock yards they were to be turned over and sold in payment of draft.

Draft identified. [p. 87.]

On cross-examination testified: Mr. Lyon came to the bank. Said he had bought cattle; wanted to ship and arrange to pay. I asked him how he was going to ship. He said the usual way. I told him, all right. That was all. Patterson not present. I talked with Lyon. He applied to me for the money, and I furnished it to him. [p. 89.] He said, "Here is your bill of lading." It didn't cover six cars. I asked him why. He said Guthrie wished to procure a pass, and billed two cars to him for that purpose. Nothing was said up to this about my buying the cattle and paying Patterson for them.

John Guthrie testified: I went with the cattle. Had no interest except to get a pass.

At this time, on account of the counsel doing the principal part of the testifying, the court suggested that they take the stand. [p. 92.]

Eugene Rust called. Testified: Am assistant superintendent of the Kansas City Stock Yards Co. Cattle delivered from cars in separate chutes. Two cars, billed John Guthrie, contained sixteen cattle in each car. Four cars, billed C. S. Lyon, contained 18, 18, 18 and 15 head each. [p. 93.]

J. K. Southey testified: Bought these ninety-eight head of cattle between 2 and 3 p. m. [p. 94.]

R. B. Buffington testified: Was weigh-master. By amounts afterward weighed on the scales; I judge it was 2:00 or 2:20 p. m.

On cross-examination said: Judged of the time by the number of draughts made on the scales after this weighing and before closing for the day. I cannot tell from recollection. (p. 96.)

J. W. Peterson testified: I had draft. Went to Kansas City. Called on Mr. Means to settle. He refused; said Lyons owed him, and he had applied proceeds on his indebtedness. Saw him again. He said proceeds of sale over $6,100, less than $6,200. He told me last night it was $6,133. (pp. 98, 99.)

Plaintiff rested.

Plaintiffs in error offered deposition of J. K. McLain. Testimony to shipment of this stock. C. S. Lyons was indebted to McLain over $2,500, which was paid by Means & Sons out of proceeds of this sale. (p. 99.)

C. G. Means testified: Mr. Lyons had been shipping cattle to me. In August he said, "We are behind with you; would like to pay it." About the 8th of the month [Sept.] he was in

Kansas City. I said, "You are not squaring up." He said, "I have got a lot of money paid out on stock that I am going to ship next week, when I will be ready to pay your balance." The next transaction was on the 15th, when these cattle came in. Lyons said, "I have got these cattle. I bought them of Bob Patterson." I asked him if he was ready to meet his demands to-day. He said, "I have got these cattle here." I asked him what he gave for them. He said that was a private contract. "I have bought 143 head of other cattle. I have got some money paid in on them" [p. 100]. I said, "In justice to me I ought to know what these cattle cost, and what you are doing." I then said to Patterson, "Did you sell these cattle to Lyons? What did he pay for them?" He said, "He (Lyons) bought these cattle and paid for them. That is enough for you to know." And also said "He paid me money on other cattle." I again talked with Patterson in the presence of Mr. Wells, and asked Patterson what these cattle cost. Patterson said, "I told you once I had sold the cattle to Lyons, and he had paid for them. That is enough for you to know." I sold the cattle near to two o'clock p. m., and had a ticket placed to Lyons' credit, and at the same time got a check for $2,500, and between three and four o'clock paid it to Mr. McLain, to whom I went security for Mr. Lyons. That evening, about the time I started up town, was the first I heard of the

draft (p. 101). Mr. Lyons asked me if the draft hadn't come in yet. That was between three and four o'clock, and was the first I heard of the draft. The cattle sold for $6,133, after expenses (p. 103). The two car loads shipped by Mr. Guthrie sold for about one-third of the total amount. When I went to settle with Lyons I asked Guthrie, in the presence of Lyons and Patterson, if the cattle were his, Lyons'? He said they were—first he said they were Lyons' cattle. He [Guthrie] then gave me an order to settle with Lyons. Order as follows:

"9—15—87.

Settle with C. S. Lyons for two cars of cattle billed from myself to you, per M. P. R. R., from Randall, Kansas. The cars are—

55 I. M.—Contained 16 head of cattle.
5608 " 16 " "

[Signed.] Respectfully,

JOHN GUTHRIE."

[Order copied on page 113 of record.]

Lyon, Patterson and Guthrie were all present at the time. Nothing was said about the number of cars against which a draft was drawn or the bill of lading given. (p. 104.) There was nothing said about the bill of lading. I didn't see it until the next day. [p. 105.]

On cross-examination testified: Lyons was owing us over $5,000, and the note to McLain was $2,500, endorsed by C. G. Means & Sons. [p. 106.] Mr. Lyon was indebted on 8th of August, [September] and agreed to make shipment the next week and square up. [p. 107.]

Mr. Keily is our book-keeper. He has nothing to do with the stock, and no authority to pay drafts. He said nothing about any draft that day. (p. 109.) After selling the cattle went to the office; Patterson, Lyons and Guthrie there. Was there a half hour. Lyons started home first. I started out with him. When we got near State line Lyons asked me if draft had come in. [p. 110.] I paid the note after that.

Plaintiffs in error rested.

Mr. Patterson, recalled for plaintiff, testified:

The interest is $548.55; to $6,133; total, $6,681.55. [p. 113.]

Testimony closed.

The court thereupon ordered the jury to return a verdict for the plaintiff below and against the defendants below for $6,681.55, to which defendants below excepted. And defendants prayed the court to charge the jury as to the law of the case, which was overruled, defendants excepting. [p. 113.]

Verdict was signed as ordered, to receipt of which defendants excepted, and judgment was entered over the exception and objection of defendants. [p. 114.]

Thereupon defendants below (plaintiffs in error) filed their motion for a new trial (p. 115), with the affidavit of H. M. Jackson in support thereof. (p. 116.)

The motion for a new trial was as follows, after the title:

"Come now the said defendants and move the court to set aside the verdict of the jury and grant the defendants herein a new trial for the following reasons:

"1st. Irregularity in the proceedings of the court and abuse of discretion, by which the defendants were prevented from having a fair trial.

"2nd. Accident and surprise which ordinary prudence could not have guarded against.

"3rd. Because B. P. Waggener, Esq., has heretofore and up to the 26th day of December, 1888, when this cause was called for trial, had the sole and exclusive charge and management thereof, and because on said day, within a few hours before said cause was called for trial, B. P. Waggener, Esq., was taken seriously ill, and for that reason was unable to attend the trial of

said cause; and thereon said defendants made an application for a continuance because of said accident and illness, and supported the same by affidavits filed herein, which application was refused; and thereupon said defendants employed H. M. Jackson, an attorney at law at this court, to defend for them, and hereupon their said last named attorney undertook to manage the defense of said action in the trial thereof without any preparation or opportunity to become acquainted with the facts and questions involved and at issue in said action.

"4th. Because the assessment of the amount of recovery was too much, said action being upon a contract.

"5th. Because the verdict is not sustained by sufficient evidence, and is contrary to law.

"6th. Because of error of law occurring upon the trial, and excepted to by the defendants.

"7th. Because of the admission of incompetent evidence on the part of the plaintiff over the objection of the defendants.

"8th. Because of the exclusion of competent and material testimony on the part of the defendants excluded upon an objection of the plaintiff.

"9th. Because the court erred in instructing

the jury to return a verdict in favor of the plaintiff for the amount stated in said verdict.

Affidavits, record and oral evidence will be used on the hearing hereof.

[Signed.]

WAGGENER, MARTIN & ORR."

This motion was supported by the affidavit of H. M. Jackson, attorney for plaintiffs in error during the trial, who stated therein that he had never been informed of the subject of the action, nor of any fact relating thereto, until within two or three hours before the trial began, when he was requested by Hon. B. P. Waggener to read the pleadings, and to assist such attorney in the defense of said action in case Mr. Waggener did not recover from his then temporary illness so as to be able to try the cause, and in case the cause was ordered to be tried by the judge of the court. That within one hour before the jury was empaneled said H. M. Jackson first consulted and advised with the defendants as to the facts, points and evidence in the action.

The application for a new trial was overruled, to which plaintiffs in error excepted, and defendants allowed to prepare a bill of exceptions, supersedeas bond fixed at $10,000, and writ of error issued to this court.

ASSIGNMENT OF ERRORS.

The court erred in refusing to grant a continuance at the time the case was called for trial, because of the absence of Robert Wells, a material witness for plaintiffs in error.

This question was raised by the affidavit of C. G. Means, [record, p. 42]; by motion for a new trial on ground of abuse of discretion, and accident and surprise [record, p. 114]; by assignment of errors [record, p. 122.]

The court erred in refusing to pass the case for a few days owing to the sudden and serious illness of Hon. B. P. Waggener, the sole counsel of plaintiffs in error, and upon the increased seriousness of such sickness in refusing to continue the case over the term.

This question was raised by the affidavit of Mr. Waggener, [record, p. 43]; affidavit of C. G. Means, one of the plaintiffs in error, [record, p. 44,) with certificate of attending physician; by motion for a new trial, and affidavit of H. M. Jackson in support thereof [record, pp. 114, 115, 116] and by assignment of errors [record, p. 122.]

The court erred in holding that plaintiffs in error did not have a first lien upon the cattle shipped to them.

This question was raised by defendants' answer [record, p. 39]; by motion for a new trial [record, p. 114]; and by assignment of errors [record, p. 122.]

The court erred in its order and instruction to the jury [as stated on record, p. 113] "to return into court a verdict in favor of the plaintiff and against the defendants—an assessment of damages in the sum and amount of six thousand six hundred and eighty one and 55-100 [$6,681.-55] dollars upon the evidence in said cause."

This question was raised by objection to such instruction and charge, and by a request to charge the jury as to the law upon the pleadings and evidence [record, p. 114]; by motion for a new trial [record, p. 115]; by assignment of errors [record, p. 122.]

ARGUMENT.

The first, second and third contentions of the plaintiffs in error relate entirely to the continuance of the cause:

1. To the refusal to continue, on account of the absence of a witness for whom a subpoena was duly and timely issued, and whose testimony was material;

2. To the refusal of the court to pass the case

for a few days, owing to the sudden and serious illness of Hon. B. P. Waggener, sole attorney for plaintiffs in error;

3. To the refusal of the court to continue the case because of the continued and more serious illness of Mr. Waggener.

As these three assignments all relate to the matter of continuance they can be presented together. They are within the Code of Civil Procedure of the State of Kansas, the statute relating to which is as follows:

"Section. 316. The court may, for good cause shown, continue an action at any stage of the proceedings, upon such terms as may be just. When a continuance is granted on account of the absence of evidence. it shall be at the cost of the party making the application, unless the court otherwise order.

"Sec. 17. A motion for a continuance, on account of the absence of evidence, can be made only upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it, and where the evidence may be; and if it is for an absent witness, the affidavit must show where the witness resides, if his residence is known to the party, and the probability of procuring his testimony within a reasonable time, and what facts he believes the witness will prove, and that

he believes them to be true. If, thereupon, the adverse party will consent that on the trial the facts alleged in the affidavit shall be read and treated as the deposition of the absent witness, or that the facts in relation to other evidence shall be taken as proved to the extent alleged in the affidavit, no continuance shall be granted on the ground of the absence of such evidence."

The contention of defendant in error on the trial was, that the cattle shipped were in the possession of C. S. Lyons, consignor, and R. Patterson, seller, as agents of the defendants in error, and in support of that contention Mr. Patterson testified on the trial (record, p. 65, bottom).

"He (Bramwell) wanted me to go along with the cattle to look after the cattle. I went along."

And on page 67 the same witness testified: "I believe I told Means that the cattle were paid for, and the Bank of Randall paid me for them, and there was a draft on him. This was in the stock yards, as nearly as I can recollect, about noon."

And on cross-examination as to the same matter, page 69, said witness testified: "I believe I went up and told the cashier that the cattle was there, and asked him to go down and look at them. He went right down and looked at them. I believe he said it was all right; he

would pay for the cattle. I don't know as he said anything else."

And farther, "That is all that I recall the cashier said about the matter. He said he would pay me for the cattle; that the cattle were all right, and he would pay for them."

And as to the conversation with Mr. Means at Kansas City, on cross-examination, this witness testified (Record, p. 73):

"I don't know as to that—whether I had any talk with Mr. Means when I first arrived at Kansas City or not. Don't recollect that I had any talk in the stock yards about the cattle. Could not say that I had a conversation with him after I got off the train."

And on page 74 witness testified: "I don't know what conversation I did have with Mr. Means. I don't recollect what the conversation was. I stated to him that the Bank of Randall had paid me, and issued a draft on him. I don't know who else was present."

An on page 77 this witness testified: "I don't remember having a conversation with Mr. Means in his office about this matter in the presence of Mr. Wells."

The testimony of the absent witness, as stated in the affidavit for continuance, was, that said

absent witness would testify "that on the day said cattle were received at Kansas City the same were then in the care and custody of said C. S. Lyons. That one Robert Patterson was also at said time at Kansas City, having come with said Lyons on the same train with said cattle. That he was present during a conversation on this day between said Patterson and affiant, and heard said Patterson tell affiant [C. G. Means] that said cattle were Lyons' cattle; that he [Patterson] had sold them to Lyons, and had his money [Record, p. 43].

It was claimed by defendant in error, in its petition and in its testimony, that Patterson was at that time its agent, and, if so, bound by his declarations and the testimony of the absent witness, Wells, as to the statements of Patterson were therefore very material as showing the representations made by Patterson as such agent directly in conflict with the testimony given by him on direct examination. An examination of the testimony of this witness (contrasting the testimony given upon leading questions upon direct examination with that on cross-examination) tends to show the witness in an unfavorable light as to the character of his testimony, and impresses one, from such reading alone, that he had been upholstered for the occasion as to the delivery of the possession of the stock to the bank, and as to his statements claimed to have

been made to plaintiffs in error in relation to the draft. Of no other matter or conversation did this witness pretend to give a connected statement. It was therefore competent and material to prove statements made by him as such agent, not only contradictory of those made upon the witness stand, but favorable to the plaintiffs in error.

The absent witness had recently changed his residence. A subpoena was issued for him immediately upon the assignment of the docket, thirty days before the trial, and his change of residence was unknown until after the return of such subpoena, and defendants were unable to ascertain his whereabouts. In the exercise of a fair discretion the case should have been continued, or plaintiff should have admitted the affidavit as the testimony of the absent witness under the statute It did appear from such affidavit and record that the testimony was material, and refusal of the court to grant a continuance upon that ground was error.

Swenson vs. Aultman, Miller & Co., 14 Kas., 277.

2. The cause should have been passed a short time on account of the serious illness of Hon. B. P. Waggener, as claimed in the second error assigned; and later in the day, and after the noon adjournment, upon the applications of

the plaintiffs in error, the case should have been continued over the term.

Defendant in error (plaintiff below) had filed three separate petitions, and was engaged more than fifteen months in preparing the case for trial with the assistance of its attorneys, cashier and the witnesses. By the sudden illness of Mr. Waggener (who was the sole attorney of plaintiffs in error) and the refusal of the court to delay the trial for a brief time, and later to continue it, the plaintiffs in error were compelled to go into trial without time to consult with an attorney, or to inform him of the circumstances attending the case, or of the nature of the testimony, and without time or opportunity on the part of the attorney to acquaint himself with the pleadings and issues, or facts. It was an accident, and within the terms of the Code of Civil Procedure, entitled the plaintiffs in error to a continuance for a brief time, in which to employ counsel and make reasonable preparation, and the refusal of the court on that ground was material error.

This claim was presented by the affidavit of Mr. Waggener and of Mr. Means (one of the plaintiffs in error,) with the certificate of the attending physician; and the denial was an abuse of discretion by which the plaintiffs in error were prevented from having a fair trial.

Shultz vs. Moore, 1 McLean, 334,

Graves vs. Rayle, 19 Ind., 83,

Vandizer vs. McMillen, 37 Ga., 299,

Marrero vs. Nunez, La. An., 54,

all cited with approval of the Supreme Court of the State of Kansas in Markson vs. Ide, 29 Kas., 703.

The case on trial was an important one to all concerned. Plaintiffs in error had a large amount of money due to them as factors on general account from C. S. Lyons, who accompanied the cattle to Kansas City, and who (according to the testimony of Mr. Means) claimed to be the owner of the cattle, and (according to the statement of Mr. Patterson to Mr. Means) had been fully paid for the cattle, and one week before, said Lyons had agreed that the next shipment should be in discharge of such balance due to plaintiffs in error.

Defendant in error had, by numerous local and other counsel, had ample time in which to prepare the case, having stated the cause of action in three different forms of petitions; had consulted with the witnesses, and some parties [as may be inferred from the testimony given] had had much influence with the witnesses in securing a statement of facts favorable to the bank [plaintiff below.]

Mr. Waggener had been the sole counsel for the plaintiffs in error; had properly prepared for trial; but it was impossible in the brief time of one hour for the plaintiffs in error to advise an attorney who was an entire stranger to the case as to the issues and facts in the case sufficiently to enable such counsel to properly prepare for the trial.

Under such circumstances the cause should have been continued, and the refusal of the court was material error.

3. At the time of the receipt of the cattle in controversy there was due from C. S. Lyons, the consignor, to the plaintiffs in error, as factors on general account for expenses, advances and services, the sum of $7500.00. They had long been doing business as factors for said Lyons, as the defendant in error well knew, and as alleged in its petition (record, p. 38.) Mr. Means, one of the plaintiffs in error, so stated to Mr. Peterson, attorney and witness for the bank (testimony of Mr. Peterson, p. 98), and Mr. Lyons had on September 8th, agreed to make a shipment the week that these cattle were received to apply on such general account. When the shipment in controversy was received plaintiffs in error had a lien on the cattle received for such general balance.

For amount due plaintiffs in error for balance on account of advances made and services ren-

dered as factors, and on the agreement of Mr. Lyons to make such shipment to pay such account, and the possession of the cattle delivered to them, the law implied a lien for all such balance.

Walker vs. Birch, 6 T. R., 258.

Shaw vs. Ferguson, 78 Ind., 547 at 554.

Indeed, we deem it unnecessary to cite authorities upon this proposition. Without other evidence plaintiffs in error were, therefore, entitled to retain the cattle, sell the same, and apply the proceeds upon their claims; and before the bank (defendant in error) could recover, it must state and prove a superior right or lien to such property. This it attempted to do by claiming (1) under purchase of the cattle and delivery of possession to it; (2) by contract between itself and Mr. Lyons and the railroad company that the cattle should be delivered to and received by the railroad company for the bank.

Upon all such claims there was an entire failure of evidence, and the bank could not upon either of such grounds defeat the lien of plaintiffs in error.

But the bank also relied upon the bill of lading issued by the railroad company to Lyons, the purchaser, and the endorsement thereof, accompanied by a draft of Lyons' upon the consignees.

In this respect it failed as to two car loads not included in the bill of lading, and which were shipped by one John Guthrie, who in the stock yards directed the consignees (plaintiffs in error) to settle with Mr. Lyons, the owner and debtor. Such two car loads, therefore, were not taken out of the operation of the lawful lien of plaintiffs in in error.

But the bank also claimed possession and lien upon the property by delivery of the cattle to it, and by placing said Patterson in charge thereof for shipment as its agent.

Such claim Mr. Patterson, as a witness for the bank, attempted to sustain. But it further appeared from the testimony of Mr. Means that after the cattle came to the possession of the plaintiffs in error, Mr. Patterson told him that Mr. Lyons had bought and paid for the cattle, and in effect, that he should settle with Mr. Lyons.

The bank, having made him (Patterson) its agent, put him in possession of the cattle. The surrender of such possession to plaintiffs in error, and information to them to settle with the consignor, terminated the lien of the bank (if it had any) upon such cattle. Having as such agent parted with the possession, and disclaimed interest in, the cattle, the lien of the bank was surrendered and waived. The express stipulation of

such agreement put an end to the lien of his principal.

Walker vs. Birch, 6 T. R., 258 at 262.

Hull vs. Jackson, 20 Pick. (Mass.), 194.

It is a general proposition that a lien is lost by parting with possession; and when the bank by its agent authorized plaintiffs in error to settle with Mr. Lyons, the consignor, it then lost its lien on the property and relied on the personal obligation of the consignor. It had no claim against plaintiffs in error.

Houghton vs. Matthews, 3 Bos. & Pul., 485, 489, pr. Chambre, J.

The lien claimed by the bank having been abandoned and the possession delivered to plaintiffs in error, they properly insisted upon their right to the property and the proceeds of sales under their lien.

In Hull vs. Jackson. *supra*, the court discussing the doctrine lien, uses the following language:

"In order to constitute a lien there must be some possession, custody, control, or disposing power, in the person claiming the lien, or his agent, in and over the subject matter, in which such lien is claimed. This is the fact, in the case of a carrier, a factor, a manufacturer or workman, or warehouse-keeper. In the case of a factor, indeed, the factor sells the goods, and thereby parts with the lien on the goods; but at the same moment he takes the proceeds, whether the

money, or security, which he may take in his own name, and thus as between him and his principal, the lien is immediately transferred to the proceeds."

Again the court say:

"But by the very nature of the duty undertaken by Messrs. Brown & Co., that of receiving the goods in packages from Burslem and forwarding them to America, to be delivered, not to an agent of theirs but to the purchaser of the goods from the Jacksons, they were necessarily to part with the custody of the goods, without retaining or having any power or control over the proceeds."

And the court further say:

"When this duty of shipping was performed, they had neither the possession nor right of possession of the goods."

In McFarland vs. Wheeling, 26 Wend. (N. Y.) 467 at 472, the court say:

"Lien has been well defined to be 'the right of one man to retain property in his possession belonging to another, until certain demands of the party in possession are satisfied.' *Hammond vs. Barclay*, 2 East, 235. This definition, given by Judge Grose, has been adopted in our American decisions and text-books of commercial law. Thus the sole question presented for decision in cases of lien, either in law or equity, is, as *Sir W. Grant* expresses it, 'whether there be a right to *detain* the goods until a certain demand be satisfied.' *Gladstone vs. Burlay*, 2 *Mer. R.* 404. The particular lien given to mechanics, millers, artificers, dyers, carriers &c., is an application of a common law principle, dictated by natural justice, which gives to every man who has a lawful

possession of anything upon which he has expended his money, labor or skill, at the request of its owner, the right to detain it as security for his debt, instead of leaving him to the risk of losing his labor, time or money, by trusting only to the general responsibility of the customer. This common law right may be extended by an express contract, or one implied from usage and mutual understanding, that the movables in possession of one party shall not only be held for the expenses and labor actually bestowed upon them, but also as a security for the balance of similar demands. Such a contract is in the nature of a pawn of the articles, and, like all other pledges, depends upon *continued* possession; for it is simply a bargain that the pledge shall be *retained* until the debt is paid.

"The very definition of the word *lien*, as 'the right to retain,' indicates that it must cease when the possession is relinquished. This principle, so clearly founded in reason and so congruous to public utility and the convenience of trade, is supported by the uniform testimony of the decisions. Thus, said Lord Kenyon, 'the right of *lien* has never been carried further than while the goods remained in possession of the parties claiming them.' 11 *East.*, 14. This remark was cited with approbation by Lord Ellenborough, in *M'Combie vs. Davies*, 7 *East.*, 7, and the whole current of decisions in equity and common law, in England and in the United States is the same way."

Kitteridge vs. Freeman, 48 Vt., 62.

Bailey vs. Quint, 22 Vt., 474.

The Supreme Court of Wisconsin in Susan-

brenner vs. Matthews, 48 Wis., 251, quoting from Parsons on Contracts, say:

"Lien is a right to hold possession of another's property for the satisfaction of some charge attached to it. The essence of the right is possession..... Lien is neither a *jus ad rem* nor a *jus in re*, but simple right of retainer."

And adopting the language of Mr. Story, they further say:

"The voluntary parting with the possession of the goods will amount to a waiver of the lien; for, as it is a right founded upon possession, it must ordinarily cease when possession ceases."

In Nevan vs. Roup, 8 Ia., 207, the Supreme Court of Iowa, adopting the views of the Supreme Court of Vermont, in Bailey vs. Quint, 22 Vt., 464, say, Section 6, syllabus:

"It is essential to the lien of the workman that the property be delivered into his possession for the purpose of bestowing his labor upon it, and if he parts with the possession before his charges are paid he loses his lien, and it is not reinstated by his again coming into possession of the property, without the consent or agreement of the employer."

The claim of the bank defendant in error to the two car loads of cattle and to the proceeds of sale thereof, must fail because they are not included in the bill of lading, and the evidence disclosed that plaintiffs in error had the legal possession thereof with the consent of the agent

of the bank, and the like claim to the four cars of cattle included in the bills of lading, must fail because the agent of such bank delivered possession thereof to plaintiffs in error.

4. Under such conditions, and the positive testimony of Mr. Means as to the lien of plaintiffs in error, the case should have been submitted to the jury under proper instructions as to the law of the case. The taking of the case from the jury either by demurrer to the evidence or by directing a verdict in favor of one party, is never sustained except when, admitting all the of adverse testimony to be absolutely true, no other result could be reached by the jury.

In this case the testimony of Mr. Means positively sustained the claim of the plaintiffs in error and the abandonment by defendant in error of the lien it claimed, and the same was only inferentially controverted by Mr. Patterson, a witness for defendant in error, and then only by answers which were suggested by counsel's questions, in effect putting the testimony in the mouth of the witness.

Under such testimony the rule adopted in this court in numerous cases cited should have been adhered to, and the jury instructed as to the law of the case, and required to return a verdict upon the evidence under such instructions.

By a demurrer, or directing the verdict, the other party is bound to admit not only the truth of the adverse evidence, but every fact which that evidence legally conduced to prove in favor of the plaintiffs in error.

Thornton vs. Bank of Washington, 3 Pet., 36.

Bank of U. S. vs. Smith, 11 Wheat., 171.

Fowle vs. Alexandria, 11 Wheat., 320.

No issue could be joined upon the demurrer, because there was a matter of fact in controversy between the parties in which the testimony of the plaintiffs in error was positive and direct against the testimony of the defendant in error. The defendant in error could not have admitted the facts claimed and proven by the plaintiffs in error, without which the direction of the court was erroneous.

Young vs. Black, 7. Cranch, 565.

The rule as to directing the verdict upon the evidence is the same as to a demurrer to evidence.

Parks vs. Ross, 11 How., 362.

The practice of demurring to evidence is not calculated to promote justice, and should be discouraged, and the courts will be extremely liberal in their inference where the party takes the questions of fact from the jury.

Bank vs. Smith, 11 Wheat., *supra*.

The proposition is stated by this court in

Jones vs. E. Tenn., &c., R. R. Co., 128 U. S., 443,

in which the court say: "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."

And further,

"Instead of the course here pursued a due regard for the respective functions of the court and jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as to have secured a sound verdict."

The same rule applies under the Code of Civil Procedure of the State of Kansas.

This is especially true as to the two car loads of cattle not included in the bill of lading assigned to defendant in error, and for which the consignee had no bill of lading, and which were shipped in the name of John Guthrie, upon whose written order the consignee was directed to settle with the consignor, which direction and agreement was made with the knowledge of the agent of the defendant in error.

Also in Dunlap vs. Northeastern R. R. Co., 130 U. S., 649, where the court say:

"The circuit court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow as matter of law that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish."

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IN THE

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OCTOBER TERM, 1892.

C. G. MEANS, W. W. MEANS, AND C. H. MEANS, Partners doing business as C. G. MEANS & SONS,
Plaintiffs in Error,
vs.
THE BANK OF RANDALL.

No. 63.

In Error to the Circuit Court of the United States for the District of Kansas.

Statement and Brief for the Defendant in Error.

EDWARD H. STILES,
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STATEMENT.

The following is a concise and perfectly correct statement of the case, as established by the evidence at the trial, at the close of which the lower court directed a verdict for the plaintiff.

The plaintiff—defendant in error—is a bank, organized under the laws of and doing a general banking business in the state of Kansas, at the town of Randall.

The defendants—plaintiffs in error—are commission men at Kansas City, engaged in receiving consignments of and selling live stock shipped to them by owners and buyers, receiving for their services a commission. R. G. Patterson, a cattle raiser, residing in Jewell County, Kansas, was the owner of ninety-eight head of fat cattle, which one C. S. Lyons, a cattle dealer, residing in the same county, desired to buy. He did not, however, have the means with which to make the purchase. He accordingly, in company with Patterson, applied to Mr. Bramwell, the cashier and agent of the bank, for a temporary loan of $6,700, with which to pay for the cattle and the expense of shipment, until they could be shipped to and sold at Kansas City. The result of this application was, that the bank, after its cashier had personally examined the cattle and become satisfied that they would be sufficient security for the advancement required, agreed to furnish and pay over to said Patterson the purchase price, on the express condition that the bank should have and retain a lien upon and a pledge of the cattle as its security for the advancement until the cattle

should be shipped to and sold by the consignee at Kansas City, and to this end it was agreed that delivery of the cattle should be made by the owner to the bank, which was done, and that it should have the title and right of possession thereof until they were sold by the consignee and the bank reimbursed from the proceeds. Patterson at the request and as the representative of the bank was to go with the cattle. (Patterson's Ev., Printed Record, 63-72. Bramwell's Ev., 85-90.) The defendant's firm, C. G. Means & Sons, (plaintiffs in error) was named and selected as the consignee to receive and sell the cattle, and the shipment was made accordingly on the 14th day of September, 1887, in six cars of the Missouri Pacific Railroad Company, accompanied by Patterson, Lyons and one Guthrie, who desired to get a pass to Kansas City and whom Lyons had previously arranged with to go along. Under the rules of the railroad company only two persons could receive passes on account of a single shipment or billing and, for this reason, four of the cars were billed as shipped by Lyons and the remaining two as by Guthrie. Accordingly a bill of lading for the four cars was issued in the name of Lyons and, Guthrie not yet having arrived on the ground from his home, no bill of lading was issued to Guthrie for the two

cars but they were simply billed to him in his absence. (Lyons' Ev., Printed Record, 80-81. Bramwell's Ev., 87-90.) Lyons, who had been in the habit of shipping, transacted this part of the business with the railroad agent, while Bramwell, the cashier, was at the bank.

The cattle started on the 14th of September and arrived at the Kansas City Stock Yards about 9 o'clock of the following morning, September 15th, (Rust's Ev., Record, 92.) and after being unloaded into the chutes of the Kansas City Stock Yards Co., were delivered to the consignee, C. G. Means & Sons, and by them, between 2 and 3 o'clock in the afternoon of the same day, (Southey's Ev., Printed Record, 94; Buffington's Ev., 96; Means' Ev., 110.) sold to the Armour Packing Co. for the sum of $6,133, which they converted to their own use in the manner hereinafter stated. At the time of the arrangement hereinbefore referred to for the advancement of the purchase money by the bank, it was agreed that a draft for the sum should be drawn by Lyons against the cattle, or shipment, on the consignee, C. G. Means & Sons, to be by them accepted and paid out of the proceeds of the cattle. This was accordingly done and the draft indorsed and delivered to the bank, together with the bill of lading which had been issued for the four car loads,

none, as before stated, having been issued, for the other two car loads. (Bramwell's Ev., Printed Record, 87.) On the same day the bank forwarded this draft, to which was attached the bill of lading, to the Bank of Commerce, its correspondent at Kansas City, for collection, which was received by the bank early the following morning and by it given to its collecting messenger for presentment and collection at the office of C. G. Means & Sons, which is in the Live Stock Exchange building at the stock yards. Between the hours of 10 and 11 o'clock of the same forenoon, and more than three hours before C. G. Means & Sons had sold the cattle to the Armour Packing Co., this draft, with the accompanying bill of lading, was presented by this messenger at the counter of C. G. Means & Sons to their agent, in charge of their office, who, after examining, returned them to the messenger with the direction that he should leave them at the Stock Yards Bank, which was the prevailing custom at the stock yards with respect to drafts that the messengers of the different banks failed to collect on presentation. (Testimony of messengers Kingsbury and Hickman, Printed Record, 57–62, and of Connelly, cashier Stock Yards Bank, 53–57.) Between 2 and 3 o'clock in the afternoon of the same day it was, by the collector of the Stock Yards Bank,

again presented for payment at the office of C. G. Means & Sons, and between 3 and 4 o'clock it was again presented by the cashier of that bank and by him formally protested for non-payment. (Connelly's testimony, Printed Record, 53–57.)

More than three hours after the presentation of the draft and bill of lading at the counter of C. G. Means & Sons by the messenger of the Bank of Commerce, they sold the cattle to the Armour Packing Co., and, in the face of the notice they had thus received, converted the proceeds to their own use, and refused to pay the draft, giving as an excuse or reason therefor that Lyons was indebted to them on an old account, and that they had a right to apply the proceeds of these cattle thereon. (Peterson's Ev., Printed Record, 98-99; Wood's Ev., 47; Means' Ev., 101.)

Thus far, and in all the respects stated, there was no conflict whatever in the testimony.

In addition to this uncontradicted testimony, it was shown by that of Patterson (Printed Record, 63-78) and by that of Lyons (78-84) that on the morning the cattle arrived C. G. Means, the senior member of the firm, was personally notified that the Bank of Randall had paid for the cattle and that a draft had been drawn on C. G. Means & Sons and delivered to the bank therefor. While the unequivocal testimony of these two witnesses is in

one breath faintly denied by C. G. Means, he substantially admits it in another; admits that Lyons asked him "If the draft had come in yet" (Printed Record, 101, 102, 104, 110), and that he "thought he referred to the draft on the cattle," and that he "supposed there was a draft out on the cattle." (Printed Record, 111.)

The testimony is undisputed that not a dollar was paid or parted with by C. G. Means & Sons, and the only justification attempted is their claimed right to apply the proceeds of the cattle consigned to them on their old account against Lyons.

This was the case made by the evidence upon which a verdict for the plaintiff was directed by the court. Upon the proposition that the court was right in so doing, we respectfully submit the following points and authorities, though in so doing we must proceed somewhat in the dark, as counsel on the other side have not yet favored us with a copy of their brief, and we shall therefore be obliged to anticipate what they may be able to say in support of the extraordinary and, as it seems to us, flagrantly unjust conduct of their clients.

BRIEF.

The advancement of the purchase money by the bank, under and upon the faith of the agreement that the cattle and their proceeds were to be security therefor, and that a draft was to be drawn against the cattle on the consignee for the amount, with the further agreement that a bill of lading was to be issued and turned over to the bank, constituted a lien upon and a pledge of all the property so far as plaintiffs in error are concerned, who had acquired no new rights and changed their position in no essential respect on account of the transaction, even though the bill of lading as issued did not by its terms cover the two cars billed in the name of Guthrie.

I.

And first, as to the four cars specified in the bill of lading. In respect to these it would seem that among lawyers there could be no tenable ground for difference of opinion in view of the state of authorities, which are quite uniform, on the question.

A bill of lading represents the goods and as effective transfer of *ownership* as well as of *right of possession* may be made by the transfer of the bill as can be made by a physical delivery of the goods themselves.

Benjamin on Sales, Sec. 1211.
Blackburn on Sales, 297.
Hutchison on Carriers, Sec. 129.
Conrad vs. Atlantic Ins. Co., 1 Peters, 389.
Dows vs. The National Exchange Bank, 1 Otto, 618.
Am. and Eng. Encyclopedia of Law, vol. 2, p. 242.

And when a bill is transferred or delivered as collateral security the rights of the pledgee thereunder are the same as those of an actual purchaser, so far as the exercise of those rights is necessary for the holder's protection.

Dows vs. National Exchange Bank, 1 Otto, 618.
Tilden, vs. 45, Vt., 195.
Halsey vs. Worden, 25 Kansas, 128.
Emery & Sons vs. The Bank, 25 Ohio State, 360.

And the simple delivery of the bill of lading, though *without endorsement*, to a person or bank making advances transfers the property in the goods which it covers.

Bank vs. Homeyer, 45 Mo., 145.
Emery vs. The Bank, 25 Ohio State, 360.
Bank of Green Bay vs. Dearborn, 115 Mass., 219.
Bank of Rochester vs. Jones, 4 N. Y., 497.
Holmes vs. Germ. Security Bank, 87 Pa. State, 525.

And a bank making advances thereon has a lien on the property, to the extent thereof, in the hands of the consignee, and can recover from him the proceeds thereof, even though the consignor be indebted to the consignee on general account. He cannot appropriate the property or its proceeds to his own use in payment of a prior debt.

Halsey vs. Warden, 25 Kansas, 128.
Davenport National Bank vs. Homeyer, 45 Mo., 145.
Bank of Rochester vs. Jones, 4 Comstock (N. Y.), 497.
Conrad vs. Atlantic Ins. Co., 1 Peters. 387.
Gibson vs. Stevens, 8 Howard, 631.
3 Parsons on Contracts, 487.
Hutchison on Carriers, Sec. 129.

So that it would seem too clear for argument that, so far as the cattle contained in the cars named in the bill of lading are concerned, they, by the delivery and indorsement of the bill, passed to the bank, as security for the advancement and the draft given therefor. In the language of

the Supreme Court of Missouri, in an exceedingly well considered case—*Davenport National Bank vs. Homeyer, supra*—"they were the property of the bank for the purpose of meeting the dishonored draft."

II.

This brings us to the consideration of the two cars shipped or billed in the name of Guthrie, and for which no bill of lading was issued. The object of their being thus shipped has been already stated. He had no interest in them. It was simply to procure for him a pass. Not being present, and probably because there are some stipulations which the shipper has to sign, no bill of lading was issued to him and the cattle were simply billed in his name. On this subject Mr. Guthrie testifies (Printed Record, 92): "I had no interest whatever in the cattle except as to getting a pass. I was going there and they gave me a pass on the cattle." On the same subject Patterson says (Printed Record, 66): "Q. Do you know why bill of lading was not issued for two of the cars? A. They could not pass but two men on the six cars, so they had to bill two cars to Mr. Guthrie in order for him to get a pass. He was not there at the time. These two cars were billed

in his name for the reason that only two could pass without bills or shipments were separate."

To the same effect is the testimony of Lyons (Printed Record, 80). He also states (Record, 81,) that, when he delivered the draft and bill of lading to the bank, he explained to the cashier why it did not cover the two cars, as it had been agreed that a bill of lading for the cattle should be turned over to the bank as a part of the transaction. And just what that explanation was is shown by the testimony of the cashier himself (Printed Record, 87), which, for the convenience of the court, will presently be more specifically pointed out when we come to examine difinitely the nature of the transaction the parties entered into. And this, we claim, was in substance and effect a verbal mortgage or pledge of the cattle to the bank for the express purpose of securing it in the advancement it was asked to make, and upon the faith of which the advancement was made. On this point Patterson says (Printed Record, 64–76):

I am engaged in raising and feeding cattle in Jewell county, Kansas.

Q. You may state what you know about this particular transaction—about this 98 head of cattle, for the purchase of which it is claimed that the Bank of Randall furnished the purchase-money. A. I contracted them with Charlie Lyon, and the Bank of Randall paid for them. I delivered them to the Bank of Randall.

Q. Where were the cattle when you delivered them to the Bank of Randall? A. They were delivered in the stock yards.

Q. How did the cattle get to the stock yards? A. I delivered them there, with the help of Charlie Lyon.

Q. You and Charlie Lyon drove the cattle down there, penned them, yarded them? A. Yes, sir.

Q. Why were they delivered to the bank; for what purpose? A. Because Mr. Lyon told me he had no money to pay for them.

By the COURT; What do you know about it? A. That was the reason I delivered them to the Bank of Randall, because they were the parties that were to pay me for the cattle.

Q. State whether or not they were delivered to the bank for the purpose of securing the bank. A. Yes, sir.

Q. Why were they delivered to the Bank of Randall? What was the object and purpose? A. So that they might have them for the purchase-money.

Q. So that the bank could have them for the purchase-money—to secure the bank? A. Yes, sir.

Q. Do you recollect what the amount was? A. Why, I was to have $65.00 a head for the cattle.

Q. There were how many head? A. I think 98 head.

Q. State whether or not there was to be a draft drawn by Lyon on Means & Sons for the cattle for the amount that the bank advanced. A. Yes, sir; there was.

Q. What was said, if anything, about as to who the cattle were to be consigned to? A. They were to be consigned to C. G. Means & Sons.

Q. For what purpose? A. For the purpose of selling them.

Q. And what were they to do with the money? A. They were to return it to the Bank of Randall.

Q. Now, state whether or not a draft was drawn for the amount. A. I think it was.

Q. Who represented the bank; who was the cashier? A. Mr. Bramwell.

Q. State whether or not he went to look at the cattle. A. Yes, sir.

Q. For what purpose? A. To see if they would be satisfied to furnish the money.

Q. Where did he go to look at them? A. Down to the stock yards.

Q. Down where they were? A. Yes, sir.

Q. That is where you were at the time you say they were delivered to the bank, or delivered to him as the representative of the bank? A. Yes, sir.

Q. What was done with the cattle after this arrangement and this delivery? A. They were loaded.

Q. In how many cars? A. Six cars.

Q. Do you know a man by the name of John Guthrie? A. Yes, sir.

Q. Where does he live? A. He lives—a neighbor to me—in Jewell county, Grant township.

Q. State whether or not you and he had arranged for him to go to Kansas City with the cattle. A. Yes, sir.

Q. State what Mr. Bramwell said to you in regard to going to Kansas City with the cattle. A. He wanted me to go along with the cattle.

Q. Who wanted you to go with the cattle? A. Mr. Bramwell, the cashier.

Q. For what purpose? A. To look after the cattle.

Q. Did you go along? A. Yes, sir.

Q. In what cars were they loaded, of what railroad? A. The Missouri Pacific.

Q. Do you know anything about why bills of lading

were not issued for two of the cars? A. Because Mr. Guthrie wanted to go along, and they intended to run them all together. They could not pass but two men on the six cars, so they had to bill two cars to Mr. Guthrie in order for him to get a pass.

Q. All of these 98 head had been bought from you? A. Yes, sir.

Q. And the Bank of Randall advanced all the money to pay for them, and you delivered all the cattle to them; that was the agreement? A. Yes, sir.

Cross-examination (Printed Record 68):

Q. Did he (Lyons) ever pay you any money on these cattle? A. No, sir.

Q. Who went with you to the Bank of Randall with the cattle? A. Mr. Lyons did.

Q. What was he to pay you for the cattle—how much a head? A. $65.00 a head.

Q. Where were you to deliver them under that agreement? A. To the Bank of Randall. I was to deliver them to the Missouri Pacific stock yards in the town of Randall. * * *

Q. Did you deliver them in the stock yards at Randall? (Printed Record, 69.) A. Yes, sir.

Q. What did Lyons say to you then about paying for the cattle? A. Why, the arrangement was made for the pay for the cattle before.

Q. How long was it after you put the cattle in the stock yards there before you had any conversation with the bank cashier? A. I had a conversation with the bank cashier the day before that time.

Q. Did you have any conversation with the bank cashier on the day the stock was delivered at Randall? A. Yes, sir; I did.

Q. Where did that conversation take place? A.

It took place down at the stock yards and at the bank both.

Q. Where did you have the first conversation? A. I believe I went up and told the cashier that the cattle was there, and asked him to go down and look at them. * * *

Q. What did he say then? (Printed Record, 70.) A. He went right down and looked at them, I believe.

Q. Do you know whether he did or not? A. He did.

Q. What did he say about the cattle and about taking the cattle at that time? A. He said that he would pay me for the cattle. He said that the cattle were all right, and he would pay for them.

Q. Did you have any other conversation with the bank cashier about these cattle on that day? A. Why, he said he would like to have me go down with the cattle.

Q. And he looked at the cattle and said they were all right, and wanted you to go to Kansas City. Now, was there anything else? (Printed Record, 71.) A. Yes: there was something said about taking a bill of lading on the cattle.

Q. When and where was that said? A. It was said some time during that forenoon. The understanding was that he was to have a bill of lading on the cattle.

Q. What else did you hear said between them about these cattle belonging to the bank? A. Why, I turned them over to the bank; that is all I know about it.

Q. You turned them over to the bank? A. Yes. sir.

Q. Where did you do that? A. Right there in Randall.

Q. What did you say when you did it? A. I went up to the bank and told them that the cattle was in, and

wanted them to go down and look at them and receive the cattle.

Q. Did they go down and look at the cattle and state they were all right and they would pay for them? A. Yes, sir.

Q. Do you mean to say or did I understand you to say in your direct examination that these cattle were sold to the bank—delivered to the bank? (Printed Record, 72.) A. I said they were contracted to Lyons and delivered to the bank.

Q. You contracted them to Lyons and delivered them to the bank? A. Yes, sir.

Q. Was there anything said about the bank buying the cattle or receiving the cattle themselves or simply a draft on the cattle? A. I was to deliver the cattle to the bank at Randall.

Q. Can you tell the jury whether the cattle were in fact to be delivered to the bank or to be delivered to Lyons, and he was to give a draft and bill of lading on the cattle? A. The cattle was to be delivered to the bank at Randall, and they was to pay for them.

Q. You say you delivered them to the bank. What did you do about it? A. I drove them down there.

Q. Down to the stock yards? A. Yes, sir.

Q. What else did you do? A. I turned them over to the Bank of Randall.

Q. What did you do when you turned them over to the Bank of Randall? A. The cashier went down there and looked at them—looked at the cattle.

Q. Was that all you did? A. The bank paid me for them.

Q. Was that all you did with reference to turning the stock over to the Bank of Randall—was it? A. Yes, sir; I turned the cattle over to the Bank of Randall.

Q. Did you sell them to Lyons? A. Yes, sir.

Q. When did you turn them over to Lyons? A. I did not turn them over to Lyons at all.

Q. You sold them to him and turned them over to somebody else? Did not Lyons help to select them out in your lot? A. He helped me to cut them out. The cattle were never turned over to Lyon at all, though.

Q. Did he help you drive them down to the stock yards? A. Yes, sir.

Q. And that was under the agreement that you had made with Lyons to sell them to him and deliver them at the stock yards, wasn't it? A. It was in the agreement with him and the Bank of Randall together. I had been to see the Bank of Randall the day before, and was to drive the cattle down there and turn them over to them, and they were to pay me for the cattle. That was the amount of it.

Q. What did the Bank of Randall do with the cattle after the cashier went down there to look at the cattle, and then paid you for them? A. I helped to load them there. (Printed Record, 73.)

Q. Did he (Lyons) have charge of the cattle on the train? A. Why, we had charge of them together; we took care of the cattle to Kansas City together.

Q. Did you have charge of them or did he have charge of them? A. I considered both of us had charge of them.

Q. When you got to Kansas City what did you do about the cattle? A. They were unloaded and put in in the stock yards.

Direct examination resumed by Judge STILES (Printed Record, 76):

Q. You say that you were requested by the bank to go down with the cattle, to look after their interest, or its interest? A. Yes, sir.

On the same subject, Mr. BRAMWELL, the cashier of the bank testified:

I am cashier of the Bank of Randall. (Printed Record, 84.)

Q. You may state now what you know about the transaction in question; state what was said and done about it. (Printed Record, 85.) A. On the 13th or 14th day of September Mr. Lyons and Patterson came to the bank—that is, drove up in front of the bank—and Mr. Lyons came in and said he had bought some cattle of Patterson and wanted to ship 100 head the next day—wanted to know if he could make arrangements with us for the payment of the cattle. I asked him how he was going to ship; he said in his usual way. His usual way was to give us security upon the stock and give us the bill of lading. I told him all right, if the cattle proved satisfactory to bring them on and I would let him have the money.

Q. You told him you would let him have the money if the cattle proved satisfactory? A. Yes; I believe that was all that was said between Lyons and myself that day. Mr. Patterson came in before they went out, before he went home, and asked me if Lyons had made the arrangements to ship the cattle next day. I told him he had,and I told him the circumstances. I think that was about all the conversation we had on that day.

Q. That was the day before the cattle came in? A. Yes, sir.

Q. You may state what took place, as well as you can, on the next day? A. On the next day Lyons and Patterson brought the cattle up, and they both came into the bank together. I said, "Have your cattle come in?" They said, "Yes." Said I, "Well, I will go down and look at them." (Printed Record, 86.)

Q. You would go down and look at them for what purpose? A. To see if I would be satisfied, and whether I would advance them the money, and Patterson and I went down to the yards and sat on the stock yards fence and looked at the cattle. I think Lyons was fixing up the cars, getting ready for shipment. I asked Patterson if he thought the cattle would pay out. I looked the cattle over, and we talked the matter over, and I told Patterson that I believed the cattle would pay out.

By the COURT: Did you finally accept the cattle as sufficient for the draft? A. I did. I accepted the cattle as sufficent security for the money we would have to advance.

Q. To whom were the cattle to be delivered? A. They were to be shipped to Means & Sons to Kansas City.

Q. To whom were they to be delivered there at the yards? A. They were to be delivered to us as security.

Q. Before the cattle were paid for in whose possession were they? Who was the owner of the cattle? Who was in possession of the cattle before they were paid for? A. I understood that Mr. Patterson was.

Q. You said awhile ago they were delivered "to us." Who did you mean by "us?" A. They were turned over to us as security for the payment of the money; that was my understanding about it; for the payment of the draft—payment of the money, I should say, for the cattle.

Q. What did you do in the way of advancing the money for the purchase of the cattle? (Printed Record, 87.) A. I agreed to pay the money for the purchase of the cattle on condition *that they were to be holden to us for the amount* and that we were to have a bill of lading upon the cattle, but they were, of

course to be drawn on for the amount of money advanced.

Q. You may state what further was done in the way of carrying out the arrangement. A. I went back to the bank, and in a little while Mr. Lyons came up and made the draft on Mr. Means & Sons for $6700. $6500 was to be paid to Patterson, and I don't know—I think he brought the bill of lading afterwards. I don't think he had it with him at the time he made the draft, but I won't be positive about that.

Q. What conversation did you have with him about the bill of lading—why it didn't cover the other cars. What conversation did you have with him about that, if any? A. I asked him why the bill of lading did not cover the six cars, and he explained to me that in order to get a pass for Guthrie it would be necessary to have the cars billed in his name. He said, when they arrive at the yard they will be turned over and be sold in payment of your draft. He asked me if that was satisfactory, and I told him that it would be if they was so applied.

Q. State whether or not now the draft was endorsed by Lyons after it was drawn at the time. A. It was endorsed by Mr. Lyons.

Q. Was the bill of lading endorsed at the time? A. The bill of lading was endorsed at the bank—yes, sir.

Q. What did you do with that draft and bill of lading in the way of collecting it? A. I forwarded it to the National Bank of Commerce of Kansas City, with instruction to collect it and protest if not paid.

Q. State whether it was paid or protested? A. It was protested—returned to me protested by Mr. Connelly.

Q. Has it ever been paid? A. No, sir.

Q. Has any portion of the money that you ad-

vanced under the arrangement which you stated ever been paid to the bank or for the bank? A. No, sir.

Q. What, if any, arrangement did you make with Patterson about going with the cattle? A. *I asked him if he would see after the cattle and see that the draft was paid. I told him it was a large consignment and I wanted someone to go and look after it and he said he would.*

Q. You say it was agreed that Patterson should deliver the cattle to you, and they were delivered as security? (Printed Record, 88.) A. Yes, sir.

Q. To whom did you pay this money? A. I paid the money to Mr. Patterson, or by his order. I sent it to the bank at Jewell City.

Q. How was it sent? To whom was it paid? You may explain to the jury. A. I drew a bill of exchange and remitted it through the mails to Mr. Moseley.

Q. Who is Mr. Moseley? A. He is the banker at Jewell City. I drew it in accordance with his directions.

Q. Was that in accordance with his directions? A. Yes, sir.

Q. That was the way you paid for the cattle? A. Yes, sir.

Q. What was the amount of the draft? A. $6,700.

Q. What did it cover? What did it show? A. It was supposed to cover one hundred head of cattle. I supposed there was a hundred head of cattle to be shipped. That was the statement, as I understood it, and the draft was made for $6700, and I was directed to pay $6500 to Mr. Moseley for Mr. Patterson. The difference between $100 and the exchange on the draft I paid to Mr. Lyons.

Q. For what purpose? A. For his expenses.

Q. That leaves another $100, does it not? A. I paid that to Mr. Lyons.

Q. When? A. The day before.

Q. How did you come to pay that? A. Mr. Lyons said he would like to have a hundred dollars.

Q. He said he needed it? A. He said he wanted it and I let him have it.

Q. That made the amount of the draft which you supposed was for the hundred cattle? A. Yes, sir; there was supposed to be a hundred cattle.

Cross-examination.

Q. Mr. Bramwell, what was said between Mr. Lyons, Mr. Patterson and yourself on the 13th of September; the first conversation you had about this subject. A. Mr. Lyons and I had the conversation alone.

Q. You were to furnish the money to Lyons, were you? (Printed Record, 89.) A. I was to furnish Lyons money for the cattle.

Q. Lyons applied to you for the money, didn't he? A. Lyons said he was going to ship if he could get the money.

Q. Get the money from you to pay for the cattle; was that it? A. Well, he said he was going to ship the hundred head and wanted to know if he could make arrangements with me to pay for the cattle. Yes, sir; that was about it.

Q. On the next day he came to the bank and spoke about that? A. They both came in.

Q. What was said? A. I asked them if the cattle were in, and Lyons said they were. I said we would go down and look at them, and we did.

Q. What was said between you and Lyons? A. I don't think there was very much said. Mr. Patterson

and I did most of the talking, Mr. Lyons was over fixing the cars, I think, at that time.

Q. Did you afterwards see Mr. Lyons again at the bank? A. Yes, sir.

Q. What time in the day was that? A. Some time in the afternoon, I think. I would not be positive.

A. What was said between him and yourself at that time? A. He came then to take his draft on the cattle. (Printed Record, 90.)

Q. What was said by him to you? A. I do not know that I could repeat exactly what was said.

Q. State the substance of it. A. He just simply said he wanted to make a draft on the cattle.

Q. Was that all? A. I think that was about all.

Q. You wrote out the draft and he signed it? A. Yes, sir.

Q. How long after that was it he came with the bill of lading? A. I would not be positive just how long, but it appears to me that he brought the bill of lading after he signed the draft.

Q. What did he say when he brought the bill of lading? A. He said: "Here is your bill of lading."

Q. That is where the conversation ended at that time? A. He said, "Here is your bill of lading." I went up to the bank window and looked at it and asked him why it did not cover the six cars of cattle. He said Guthrie wished to procure a pass to Kansas City and billed two cars to him for that purpose. I asked him if that was all the purpose. He said it was. He said the cars would be turned over when they got to Kansas City in payment of this draft. I told him if that was all that it was all right. I knew Mr. Guthrie and did not fear that part of the contract.

k direct.

Q. You said there was some statement made that the shipment was to be made as usual. I want to ask you if the Bank of Randall had any similar transaction with Mr. Lyons in the course of which bills of lading and drafts had been drawn. (Printed Record, 91.) A. Yes, sir.

Q. And, if so, by whom had they been drawn, and upon whom? A. They had been drawn by Mr. Lyons and upon Mr. Means & Sons.

Q. Do you recollect how long before the last transaction? A. I think about a week or ten days, or possibly a little longer. I would not say positively as to the date.

Q. State whether or not you had advanced the money in the prior transactions and upon drafts as you did in this case. A. Yes, sir.

Q. Drawn on Means & Sons by Lyons and turned over to you? A. Yes, sir.

Q. Had those drafts been paid by Means & Sons? A. Yes, sir.

Q. To what bank did you forward them for collection? (Printed Record, 92.) A. To the National Bank of Commerce, Kansas City.

Q. That was a week before? A. A short time before; I would not say just how long.

Q. Do you know whether it was one or two car-loads; how many car-loads? A. The amount was about $3,500; something like $3,500. I do not know as I ever knew just how many cars there were.

Q. That was for cattle also, was it? A. I think for cattle and hogs.

To the same effect substantially, is the testimony of Lyons.

Now, let it be remembered, that opposed to the testimony of these three witnesses there was not a *scintilla* of evidence. It stands with no attempt to contradict and *without the slightest conflict.* And upon it, or rather upon the uncontroverted facts thereby established, we respectfully submit the following as correct propositions of law, which are in themselves decisive of the case.

FIRST. A verbal mortgage or pledge of all the cattle as security for the advancement, accompanied by delivery, is clearly shown, and which would be good, in the absence of a bill of lading, against all the world. Patterson, in pursuance of the arrangement made, delivers all the cattle to the bank and, at the request and as the agent of the bank, Patterson is placed in charge of and accompanies the shipment. This being so, it would be wholly immaterial whether or not a bill of lading was issued for any portion of the cattle. Guthrie, if he represented anybody, represented Patterson and through him the bank. He was a neighbor of Patterson, and it was Patterson who had arranged with him to go. (Printed Record, 65.) In other words if the verbal mortgage or pledge included all the cattle, and was accompanied by *delivery*, then it was unquestionably good, at least as against Means & Sons, irrespective of any question of notice. Means & Sons,

were nere factors, cattle brokers, commission men, who were accustomed to and whose business it was to receive and sell such shipments. They had been chosen by and acted before for the same parties in similar transactions, and where drafts had been drawn against the shipments (Printed Record, 91), and it was but natural they should be chosen as the factors in the present instance. They advanced not a dollar on account of the shipment; they parted with no interest; they relinquished no legal right; they stood in no better position to dispute the validity of the mortgage or pledge than did Lyons himself; it was perfectly valid as against Lyons; he could not be heard to dispute it, and no more could they, having parted with no interest. Hence, we may be pardoned for repeating, the transaction was valid, at least as to them, irrespective of any question of notice, and, as a consequence, it was not only the right but the duty of the court, on this point alone, the facts being undisputed, to direct the verdict for the plaintiff. To have done otherwise would, in the language of this court on a like occasion, "been an invitation to the jury to find a fact of which there was no evidence." *Dows et al. vs. National Exchange Bank*, 1 Otto 618 (634), and hereinbefore cited in support of propositions made.

SECOND. But, as a matter of fact, the consignees did have notice that the draft had been drawn by Lyons against the cattle, and indorsed to the bank, soon after the arrival of the cattle, and several hours before they were sold. This is one of the undisputed facts of the case and is established by the evidence of Kingsbury and Hickman, the messenger of the Bank of Commerce, to whom the draft was sent as soon as made for collection, and against whose testimony there is not one word from anybody. Kingsbury says (Printed Record, 58):

Q. You may state whether that draft came into your hands; and, if so, when and with what instructions? A. It came into my hands; it came into my hands through the mail-teller to me; my instructions were to collect it.

Q. Where was the collection to be made? A. At the Stock Yards Exchange.

Q. Was Means & Co.'s office in the Stock Yards Exchange? A. Yes, sir.

Q. You were to collect it at their office? A. Yes, sir; if they wanted to pay it there; if they did not I was to leave it at the bank.

Q. You may state what time the draft thus came into your hands as collector of the Bank of Commerce? A. It came in before 10 o'clock in the morning.

Q. State what you did with it in the way of making an effort to collect? A. I presented it to the man behind the counter.

Q. Where did you go with it there? A. To C. G. Means' office, in the Stock yards building.

Q. What did you do with it then? A. I presented it to the book-keeper or cashier; I do not know who he was.

Q. Through the window of the counter? A. Yes, sir.

Q. Means' office has a counter and a window and an opening in the window? A. Yes, sir.

Q. Did you present it through this window to the person in charge of the office? A. Yes, sir.

Q. To Mr. Keily, was it? A. Yes, sir; to Mr. Keily.

Q. State whether or not he was in charge of Means & Co.'s office? A. He was the only one in there at that time.

Q. State whether or not you—what did you do, now, in the way of presentment? A. I just gave him the draft, and he looked at it, read it and told me to leave it in the bank for collection.

Q. State whether or not you gave him the bill of lading? A. The bill of lading was on the back of the draft—attached to it—pinned on the back of it.

Q. State whether or not he looked at both the bill of lading and the draft? A. To the best of my recollection he looked at them both.

Q. After reading them what did he do with them? A. He gave them back to me and told me to present them to the bank.

Q. What bank? A. To the Stock Yards Bank.

To the same effect is the testimony of Hickman (Printed Record, 61–62). This, as we have said, establishes without conflict the presentation for payment of the draft, and the bill of lading also, at the counter and office of C. G. Means & Sons and to their agent in sole charge thereof, between 10

and 11 o'clock in the forenoon of the day on which the cattle arrived, and, by the undisputed evidence of Buffington and Southey, agents of the Armour Packing Co., who purchased the cattle, it is shown that the sale was not made until between 2 and 3 o'clock in the afternoon of that day (Printed Record, 94–95). So that Means & Sons had legal notice of the existence and presentment of the draft and bill of lading between three and four hours before they sold the cattle and received the proceeds. This being so, they could not claim to be innocent purchasers, even if they had purchased and paid something for the cattle, and, *a fortiori*, they not having paid or parted with a dollar. Under the case thus made they clearly had no right whatever to pocket the proceeds of these cattle. The evidence in the respects mentioned was without conflict; there was not a scintilla against it. Thereunder the case had resolved itself into a pure question of law, which it was the province and duty of the court to decide, which it did by directing a verdict. Had it been submitted to the jury and a contrary verdict found it would have been the duty of the court to have promptly set it aside. We forbear the citation of authorities to show that in such cases it is proper for the court to direct a verdict.

THIRD. But in addition to the case thus made under evidence in respect to which there was no conflict, it was shown by testimony which was simply overwhelming, and not substantially denied but practically admitted, that Means had still more explicit notice that the bank had advanced the money to pay for the cattle, and that a draft was out against them therefor. He was so informed, by both Patterson and Lyons, shortly after the cattle arrived. Patterson testified (Printed Record, 67):

I told Means that the cattle were paid for, and that the Bank of Randall paid me for them, and there was a draft on him.

Q. Where were you when you told him that? A. In the stock yards, as nearly as I can recollect.

Q. What was it you told him? A. That the Bank of Randall had paid for them and that there was a draft out upon the cattle.

And on cross-examination (Printed Record, 74):

Q. During the forenoon, what conversation did you have or hear? A. Why, I stated that the Bank of Randall had paid me for the cattle and issued a draft on him.

On the same point Lyons testified (Printed Record, 82):

Q. What, if anything, was said by you in reference to who had furnished the money to buy the cattle? A. Mr. Means and Mr. Patterson was having a little conversation there about the cattle, but I do not remember what they did say.

Q. What did you say? A. I said there was a draft on the cattle.

Q. You told that to Means? A. Yes, sir.

Q. For what? A. Now, the amount I don't know whether I stated.

Q. What did you tell him that was for—for the purchase-money or what? A. I told him it was on these cattle.

Q. By whom did you tell him the bank draft was given? A. I told him that I had shipped the cattle from Randall.

Q. Who did you tell him, if anyone, had furnished the money? A. That the Bank of Randall had.

Q. You told him to whom it had been given and for what purpose? A. Yes, sir.

Q. This conversation was all before the cattle were sold, when you first came in there? A. Yes, sir.

And Mr. Means himself testified (Printed Record, 103.):

Q. Mr. Means, you may state whether this Bank of Randall had on other occasions drawn drafts upon shipments to you? A. They had, I think, sometimes.

Q. You may now state whether or not you ever had any notice of the drawing of such drafts on you? A. No, I never had.

Q. How long have you known Mr. Lyons? (Printed Record, 105.) A. Ten or twelve years.

Q. How long have you been engaged in the commission business in Kansas City? A. Eight years.

Q. You have had dealings with Lyons during that time—have had numerous dealings during your acquaintance with him? A. Yes, sir.

Q. Did he ship cattle to you in the fall of 1887, prior to September? A. Yes, sir.

Q. Frequently? A. He shipped some cattle from Randall; not a great many.

Q. Those were always accompanied by bills of lading or drafts on the Bank of Randall, were they? A. I do not think they were. I have no recollection of seeing any bills of lading before.

Q. Drafts were always drawn on them, were they? A. I won't be positive.

Q. These drafts were always paid by you before, weren't they? A. I think so, sir.

Q. State if you had at any time a conversation with Lyons about a draft on these cattle. (Printed Record, 101-102.) A. Along that evening, about the time I started up town, was the first I heard about a draft on them cattle that day from Mr. Lyons, Patterson or anyone else.

Q. State from whom you heard that and what the conversation was? A. As Lyons started, between three or four o'clock, I walked with him out to the railroad track, and we were talking in regard to the cattle, the sale of them and what I thought in regard to the future of next week's market. Said he, I want to ship them other cattle. Said he, do you think that would be a good time? Said I, I don't know how the market is going to be. I don't know anything about it.

By the COURT: That is immaterial. Get to the point.

The WITNESS: Mr. Lyons said to me at that time—

By the COURT: We want to know what he said about the check. A. Mr. Lyons said to me at that time, had the draft come in yet? That was all I heard about the drafts.

Q. What time in the day did you say that was? A. It must have been between three and four o'clock.

Q. Where was it that he asked you if the draft had come in yet? A. When we got in front of the Exchange building, just about on the State line.

Q. How did he come to ask you about it? (Printed Record 110, 111.) A. We were talking about shipping them other cattle to Chicago or there, whichever would be the best place, and he said he believedthe cattle would fetch more in Chicago than they would there; they were big, heavy cattle, and he thought they would fetch more there. He wanted to know what I thought about shipping to Chicago. Then he just remarked had the draft been presented or been paid or something of that kind.

Q. What draft did you think he referred to? A. I thought he referred to the draft on the cattle.

Q. You then knew there was a draft on the cattle? A. I supposed there was.

Q. At that time you had not paid this security debt that you were on, had you? A. No, but I had the cashier's check for it.

Q. You had not paid it, had you? A. I had the check.

It will thus be seen that, while Means denies that he was informed by Lyons that the draft was out against the cattle at the time testified to by Lyons, he does admit that he was so informed later in the day and before he had taken up, with the proceeds of the cattle, the note of Lyons to McClain, on which Means was security.

In addition to all this, it is shown by the testimony of Mr. Connelly, the cashier of the Stock Yards Bank, (Printed Record, 54, 55) that after the presentment of the draft by the Bank of

Commerce messenger, at the office of Means & Sons, in the morning, it was again presented there between 2 and 3 o'clock in the afternoon, and again between 3 and 4 o'clock, when it was protested.

We submit that, in any view that may be taken of the case under the undisputed evidence, no verdict could have been properly found for the defendants, and it was the plain duty of the court to so direct.

It was shown, as we have pointed out, by evidence in respect to which there was no conflict, that the Bank of Randall furnished the money with which to purchase the cattle upon the express condition that it was to have a lien or verbal mortgage on them as its security; that this agreement was followed by an actual delivery of the property, which was not necessary so far as Lyons and persons acquiring no new rights were concerned; that Means & Sons were selected as *mere factors*, who had before acted for the same parties in similar transactions, to sell the cattle; that Means & Sons, with knowledge of the fact that the bank had furnished the money to buy the cattle and that a draft had been drawn on them therefor, refused to accept or pay the draft, and coolly pocketed the proceeds of the cattle under the miserable plea that Lyons was indebted

to them on account of old transactions between them and they had a right to avail themselves of this mode of payment.

If all the cattle were pledged or mortgaged to the bank, as the evidence without conflict shows, then no bill of lading at all was necessary, and it is immaterial that in the bill of lading the two cars shipped in the name of Guthrie were not included. The pledge or verbal mortgage, as between Lyons and the bank, would be equally good as to all the cattle. *He* could not be heard to raise the objection that there was no bill of lading issued for two of the cars; *neither can Means & Sons, who occupy no better or higher position.*

In support of the foregoing views we may perhaps be pardoned for submitting the following authorities:

A factor, to whom goods were consigned, was notified of a sale made by the consignor before shipment of the goods. *Held*, that the factor, not having made advances on such goods, could not hold them for a general balance due him from the consignor.

Nat. Bank vs. Porter, 73 Cal., 430.

Cattle purchased by H., with money furnished by C., and which, as between them, belonged to

C., were shipped in the name of H. to a broker, who was informed by H. of the facts in the case. *Held* that the broker had no lien upon the proceeds of the stock for a balance due from H. for advances.

Darlington vs. Chamberlain, 120 Ill., 585.

But we are not without authority from the Supreme Court of Kansas, where the transaction was entered into, and whose decisions in construing its statutes upon the point in question and affecting the rights of its citizens we suppose this court will be inclined to follow under well settled rules. In *Bates vs. Wiggins*, 37 Kansas, 44; 14 Pacific Reporter, 442, a verbal chattel mortgage upon cattle had been made between the parties to secure Bates against his liability as surety on a note given to a bank for the purpose of raising money with which to buy feed for the stock. The transaction was *not* accompanied by delivery of the property to the mortgagee. The court was called upon to pass upon the validity of this verbal mortgage, as between Bates, the mortgagee, and the receiver of the mortgagors. The court held that the verbal mortgage was valid even though it was not followed by possession. In so ruling the court says:

"There is no provision of our statute, as there is in some of the states, that the sale of

personal property of a certain value, unaccompanied by delivery, shall be void unless a memorandum of the sale in writing is made and signed by one of the parties thereto."

"The testimony in this action tends to show that the transaction (which was a verbal mortgage or sale of cattle for the purpose of securing advances made for their feeding,) was entered into in good faith, and the conditional sale or mortgage, whichever it may be, was given upon a sufficient consideration, and, when inquired into between the parties themselves, or parties having no greater or different rights, we know of no rule, or reason for a rule, that would make *delivery indispensible* as between them, any more than under a written mortgage." Citing:

Jones Chat. Mortg's. 2

Morrow vs. Turney, 35 Alabama, 131.

This case goes farther than necessary for the purposes of the one at, bar for in this, the undisputed evidence not only clearly establishes the verbal mortgage, but delivery of possession. The delivery to Means & Sons was as mere factors, the same as if they had been delivered to any other factor.

Since writing the foregoing we have procured from the files of the court a copy of the brief of the defendants in error, and, after carefully ex-

amining the same, do not feel called upon to further enlarge this argument by replying in detail thereto in respect to the subjects we have already discussed, believing that we have effectually disposed of all the matters contained in their brief, relating to the character of the transaction and the law relating thereto, in what we have here said, reserving the right, if we feel so advised, to enlarge our views on the oral argument.

This leaves for consideration, however, the alleged error on the part of the court in overruling the motion for continuance, which was based on the absence of a witness named Wells, and the illness of Mr. Waggener, one of the counsel of plaintiffs' in error.

In regard to the first ground, if there were error in the ruling it was error without prejudice. The evidence, which it is claimed in the affidavit the witness would if present give, was wholly immaterial and could not in the remotest degree have changed the legal status of the case or affected the result.

Besides, if admissible at all, it could only be for the purpose of impeaching Patterson if the proper foundation were laid, and it is not claimed by counsel on this ground at all but as independent evidence. As such it would be clearly incompetent and hearsay. In addition to this, the

claimed statements of Patterson to this witness, or in his presence, are not in conflict or inconsistent with his testimony on the stand, and in no concievable way could have influenced the result.

In regard to the other ground, the illness of Waggener, the same may be said. Under the overwhelming and undisputed facts of the case, it is clearly demonstrated that they had not the merest shadow of a defense. The one attempted is shown by all the facts to be absolutely devoid of merit; so that if there were error in the ruling it was clearly error without prejudice.

The right to a continuance is not an absolute one; the application is addressed to the sound discretion of the trial court, which has immediate personal cognizance of all the circumstances, and, unless abuse of that discretion is clearly shown, its action will not be disturbed. Mr. Jackson had time enough, as co-counsel, to talk with his client and from him and his co-counsel to learn all the necessary facts. The case was uncomplicated and without intricacies, and the record clearly shows that Mr. Jackson got all out of it that was possible in a defense so entirely barren of even plausible merits.

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